United Nations A/CN.4/652

General Assembly

Distr.: General
9 April 2012

Original: English

International Law Commission
Sixty-fourth session
Geneva, 7 May-1 June and 2 July-3 August 2012

Fifth report on the protection of persons in the event of disasters

by Eduardo Valencia-Ospina, Special Rapporteur

Contents

Page

I. Introduction 3

II. Comments made in the Sixth Committee by States and organizations 4

  A. General comments 5

  B. Draft articles 5, 6, 7 and 8 7

  C. Draft article 9 8

  D. Draft article 10 8

  E. Draft article 11 10

  F. The right to offer assistance (proposed draft article 12) 13

  G. Duty to provide assistance (question posed by the Commission in chapter III.C of its 2011 annual report) 15

III. The Special Rapporteur's position on the Commission's question in chapter III.C of its 2011 annual report 16

IV. Elaboration on the duty to cooperate 21

  A. The nature of cooperation and respect for the affected State's sovereignty 21

  B. The duty to cooperate, an obligation of conduct 22

  C. Categories of cooperation 24

  Draft article A: Elaboration of the duty to cooperate 32

Please recycle

V. **Conditions for the provision of assistance** 32
  A. **Compliance with national laws** 32
  B. **Identifiable needs and quality control** 39
  C. **Limitations on conditions under international and national law** 45
  Draft article 13: Conditions on the provision of assistance 51
VI. **Termination of assistance** 51
  Draft article 14: Termination of assistance 53
VII. **Related developments** 53

I. Introduction*

1. The International Law Commission, at its fifty-ninth session in 2007, decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.

2. At its sixtieth session in 2008, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum it had requested from the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1-3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

3. The Commission considered, at its sixty-first session in 2009, the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies (IFRC) to the questions addressed to them by the Commission in 2008.

4. At the sixty-second session of the Commission in 2010, the Special Rapporteur submitted his third report on the topic (A/CN.4/629) in which he provided an overview of the comments of States and IFRC made in the Sixth Committee of the General Assembly on the work undertaken by the Commission up to that time. He then examined the principles that inspired the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and the question of the responsibility of the affected State. The report contained proposals for three further draft articles: Humanitarian principles in disaster response (6), Human dignity (7) and Primary responsibility of the affected State (8).

---

* The Special Rapporteur expresses his appreciation for their assistance in the preparation of the present report to the following: René Urueña, Ph.D., Director, International Law and L.L.M. Programmes, and Santiago Rojas, J.D. candidate, Faculty of Law, University of Los Andes, Bogotá; Leah Campbell, L.L.M. and Madeline Snider, J.D. candidate, New York University School of Law, New York; Christodoulos Kaoutzanis, L.L.M. Ph.D. candidate, Columbia University, New York; Emika Tokunaga, Ph.D. candidate and Visiting Researcher, School of International Public Policy, Osaka University, Osaka, Japan; Ana Polak Petric, Ph.D. candidate, European Law Faculty, Slovenia; Yann Dehaudt-Delville, L.L.M. and Magistère de Droit candidate, the Sorbonne Law School, Paris I Panthéon-Sorbonne University, Paris; Aaron Marcus, J.D. candidate, Harvard Law School, Cambridge, Mass.; Marnie Ajello, Zach Bench, Maria Valentina Castillo, Ekta Dharia, Ryan Farha, Alexandra Filippova, Sarah Fink, Ashley Gaillard, Frederic Hall, Thayer Hardwick, Hilary Harris, Mia Psorn, Justin Schwegel and Melissa Stewart, the Global Law Scholars, Class of 2013, Georgetown University Law Center, Washington, D.C.; and Paul R. Walegur, The Hague.

5. At its sixty-third session in 2011, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.l) providing an overview of the views of States and IFRC expressed in the Sixth Committee on the work accomplished by the Commission thus far, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance as well as the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected State not to arbitrarily withhold its consent) and 12 (Right to offer assistance).

6. At its sixty-first session in 2009, the Commission, at the 3029th meeting, on 31 July 2009, took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (see A/CN.4/L.758). The Commission, at its 3067th meeting, on 20 July 2010, took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776).

7. Also at its sixty-second session (2010), the Commission, at the 3057th meeting, on 4 June 2010, adopted the report of the Drafting Committee on draft articles 1 to 5, which had been considered at the Commission's previous session. Commentaries to draft articles 1 to 5 were likewise adopted by the Commission at its 3072nd meeting, on 2 August 2010. The text of draft articles 1 to 5, with commentaries, was reproduced in chapter VII.C of the report of the Commission on the work of its sixty-second session (A/65/10).

8. The Commission, at its sixty-third session in 2011, adopted, at the 3102nd meeting, on 11 July 2011, the report of the Drafting Committee on draft articles 6 to 9, which had been considered at the Commission's previous session. The Commission further adopted the report of the Drafting Committee on draft articles 10 and 11 at the 3116th meeting, on 2 August 2011. At its 3122nd meeting, on 9 August 2011, the Commission adopted commentaries to draft articles 6 to 11. The text of draft articles 6 to 11, with commentaries, was reproduced in chapter IX.C of the Commission's report on the work of its sixty-third session (A/66/10).

9. Also at its sixty-third session, the Commission, at the 3107th meeting, on 18 July 2011, referred to the Drafting Committee draft article 12, together with draft articles 10 and 11, proposed by the Special Rapporteur in his fourth report. However, owing to the lack of time, the Drafting Committee could not provisionally adopt draft article 12 at that session.

II. Comments made in the Sixth Committee by States and organizations

10. At the sixty-sixth session of the General Assembly, the Sixth Committee, at its 18th to 28th meetings, from 24 October to 4 November 2011, considered under agenda item 81 the report of the International Law Commission on the work of its sixty-third session, chapter IX of which concerned the topic "Protection of persons in the event of disasters" (A/66/10, paras. 264-289). The interventions of representatives concentrated on the text of draft articles 5 to 11 and commentaries thereto already adopted by the Commission (see A/65/10, para. 330, and A/66/10,

para. 289), as well as on the content of draft article 12 as proposed by the Special Rapporteur in his fourth report (A/CN.4/643 and Corr.1, para. 109). Representatives also referred to the points related to the present topic included in chapter III (sect. C, paras. 43 and 44) of the Commission's report, entitled "Specific issues on which comments would be of particular interest to the Commission".

11. In paragraph 43 of its report, the Commission reiterated that it would welcome any information concerning the practice of States under the present topic, including examples of domestic legislation, in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters. In this respect Austria,[1] Hungary[2] and Indonesia[3] made reference to their national legislation dealing with disaster relief. The European Union[4] elaborated on its instruments in the field of humanitarian assistance and civil protection, while the International Federation of Red Cross and Red Crescent Societies (IFRC)[5] highlighted some of the most recent developments in its activities related to International Disaster Response Law (IDRL).

A. General comments

12. As in previous years, the debate in the Sixth Committee evidenced the great interest of States and organizations in the topic.[6] Delegations in general welcomed the progress achieved by the Commission in a short time, emphasizing the importance and timeliness of the topic in the light of the rising number of losses produced by natural disasters.[7] They recognized that the Commission's work of codification and progressive development would greatly contribute to the development of disaster response law and commended its efforts in clarifying the specific legal framework pertaining to access in disaster situations, the inclusion of the fundamental principles governing disaster relief and the recognition of several duties on the part of affected States.[8] Several States acknowledged that such undertaking would help to improve the efficiency and quality of humanitarian assistance and mitigate the consequences of disasters.[9] One delegation, for example, noted that "The Commission had chosen to focus on matters of great current significance and had shown itself to be in tune with existing trends in international practice".[10]

---

[1] A/C.6/66/SR.23, para. 23.

[2] A/C.6/66/SR.24, para. 58.

[3] A/C.6/66/SR.24, para. 71.

[4] A/C.6/66/SR.21, paras. 53 and 54.

[5] A/C.6/66/SR.25, para. 45.

[6] The present summary of the discussion in the Sixth Committee identifies by name the delegations making statements, with reference to the corresponding summary records of the Sixth Committee.

[7] Slovenia (A/C.6/66/SR.20, para. 11), Poland (A/C.6/66/SR.21, para. 83), Italy (A/C.6/66/SR.21, para. 91), Colombia (A/C.6/66/SR.22, para. 25), Ireland (A/C.6/66/SR.25, para. 20), Egypt (A/C.6/66/SR.25, para. 36), Switzerland (A/C.6/66/SR.18, para. 42).

[8] Poland (A/C.6/66/SR.21, para. 84), El Salvador (A/C.6/66/SR.22, para. 11), Niger (A/C.6/66/SR.23, para. 54), European Union (A/C.6/66/SR.21, paras. 52 and 55).

[9] Romania (A/C.6/66/SR.25, para. 17), Japan (A/C.6/66/SR.25, para. 25).

[10] Switzerland (A/C.6/66/SR.18, para. 42).

13. As a general remark and a point of departure for the debate on specific draft articles, several representatives praised the Commission for striking the proper balance between the need to protect the persons affected by disasters and the respect for the principles of State sovereignty and non-interference.[11] Some delegations underlined that response to disasters, and consequently the draft articles prepared by the Commission, should always be based on full respect for the sovereignty of the affected State and should not allow humanitarian assistance to be politicized or be made an excuse for interfering in the internal affairs of the affected State.[12] The importance of international solidarity in the event of disasters was also emphasized.[13]

14. While the Commission's recognition of the role of international organizations and other humanitarian actors in the protection of persons in the event of disasters was welcomed, it was deemed unclear whether the respective draft articles also included regional integration organizations, such as the European Union.[14]

15. Furthermore, it was suggested that the proposed scope of the draft articles was too narrow with respect to the events to be covered and, therefore, it should be extended to a wider range of pre-disaster activities relating to risk reduction, prevention, preparedness and mitigation.[15] It was also felt that the draft articles themselves should focus on operational matters.[16] In addition, it was stressed that non-binding guidelines or a framework of principles for States and other parties engaged in disaster relief would be more practical and more likely to enjoy wide support.[17]

16. Delegations endorsed the Commission's view based on the position of the Secretary-General of the United Nations (A/63/677, para. 10 (b)) that the concept of "responsibility to protect" fell outside the scope of the topic and applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.[18] For the Secretary-General, extending the concept of "responsibility to protect" to include the response to natural disasters would stretch it beyond recognition or operational utility. Nevertheless, one delegation maintained that since "responsibility to protect" was among the most dynamically developing and

---

[11] Slovenia (A/C.6/66/SR.20, para. 11), Colombia (A/C.6/66/SR.22, para. 25), Sri Lanka (A/C.6/66/SR.27, para. 18).

[12] China (A/C.6/66/SR.23, para. 41), Malaysia (A/C.6/66/SR.24, para. 112), Indonesia (A/C.6/66/SR.24, para. 70), Egypt (A/C.6/66/SR.25, para. 36).

[13] Japan (A/C.6/66/SR.25, para. 25).

[14] European Union (A/C.6/66/SR.21, para. 57).

[15] Poland (A/C.6/66/SR.21, para. 84).

[16] Ireland (A/C.6/66/SR.25, para. 20). See also IFRC (A/C.6/66/SR.25, para. 42) (noting the significant operational problems as a result of the involvement of foreign actors that lacked the requisite skills).

[17] United Kingdom of Great Britain and Northern Ireland (A/C.6/66/SR.23, para. 45), Russian Federation (A/C.6/66/SR.24, para. 37).

[18] Colombia (A/C.6/66/SR.22, para. 25), Thailand (A/C.6/66/SR.24, para. 89), Japan (A/C.6/66/SR.25, para. 26), Sri Lanka (A/C.6/66/SR.27, para. 18). See also below comments made on draft article 9, especially by France (A/C.6/66/SR.23, para. 38) and China (A/C.6/66/SR.23, para. 42).

innovative concepts in international relations, further careful consideration should be given to the appropriateness of extending it to natural disasters.[19]

B. Draft articles 5, 6, 7 and 8

17. On draft article 5 (Duty to cooperate), States emphasized its importance since cooperation was essential to successful disaster relief and protection of persons in need.[20] Nevertheless, a call for further clarification of draft article 5 was made, in order to enable States to understand the extent of their obligations.[21]

18. With respect to draft article 6 (Humanitarian principles in disaster response), the Special Rapporteur was commended for recognizing the core role played by the principles of humanity, neutrality, impartiality and non-discrimination in the coordination and implementation of disaster relief.[22] Support was expressed for the Commission's view in the commentary that it was not necessary to determine whether the three humanitarian principles of humanity, neutrality and impartiality in the draft article were general principles of international law.[23] The suggestion was made to clarify the term "the particularly vulnerable" concerning the application of humanitarian principles in disaster response.[24]

19. One delegation favoured formulating a new draft article to reflect the principles of the Charter of the United Nations and the guiding principles of humanitarian assistance set out in General Assembly resolution 46/182.[25]

20. Two delegations proposed that draft articles 7 and 8, as they addressed key principles, should be better placed at the beginning of the text of the future instrument or in its preamble.[26]

21. Draft article 7 (Human dignity) was deemed especially significant, since it was the first time that it had appeared as an autonomous provision in the body of a future international instrument and it stood as a reminder that the protection of human beings lay at the heart of the topic. It was pointed out that, as recognized in the corresponding commentary, the duty to "respect and protect" was very broad, encompassing both a negative obligation to refrain from injuring the dignity of the human person and a positive obligation to maintain that dignity. The State, given its primary role in disaster response, also had the primary role in fulfilling that duty.[27]

---

[19] Poland (A/C.6/66/SR.21, para. 85) argued that although the concept today applies only in the four specific cases mentioned by the Secretary-General, it includes an important reservation: only "until members decide otherwise". In its opinion, the magnitude of threats and losses from natural disasters now meant that the time was ripe for "deciding otherwise" and undertaking the challenge of extending the concept to include natural catastrophes.

[20] Slovenia (A/C.6/66/SR.20, para. 11), China (A/C.6/66/SR.23, para. 41), Islamic Republic of Iran (A/C.6/66/SR.24, para. 51), Austria (A/C.6/66/SR.23, para. 25), Israel (A/C.6/66/SR.23, para. 33), Thailand (A/C.6/66/SR.24, para. 92), Romania (A/C.6/66/SR.25, para. 17).

[21] Cuba (A/C.6/66/SR.24, para. 26), Malaysia (A/C.6/66/SR.24, para. 120).

[22] United States of America (A/C.6/66/SR.21, para. 69).

[23] Algeria (A/C.6/66/SR.25, para. 31).

[24] Niger (A/C.6/66/SR.23, para. 54).

[25] Cuba (A/C.6/66/SR.24, para. 26).

[26] Republic of Korea (A/C.6/66/SR.24, para. 82), Ireland (A/C.6/66/SR.25, para. 20).

[27] Colombia (A/C.6/66/SR.22, para. 26).

22. With regard to draft article 8 (Human rights), it was said that in comparison to draft article 7, its wording was too general and vague and raised questions regarding its scope and interpretation.[28] The view was also expressed that the commentary should elaborate further on the meaning of human rights by referring to the protection of rights relating to the provision of food, health, shelter and education, housing, land and property, livelihoods and secondary and higher education; and documentation, movement, re-establishment of family ties, expression and opinion, and elections.[29]

C. Draft article 9

23. Draft article 9 (Role of the affected State), premised on the core principle of State sovereignty and establishing a duty of the affected State to ensure the protection of persons and the provision of relief and assistance on its territory, met with general approval of States in the Sixth Committee.[30] Although the affected State was best placed to assess its needs in that regard, its responsibility should not remain exclusive.[31] Additional consideration should be given to the affected State's duty towards the international community as a whole since inaction could have effects not only on its own territory but on that of its neighbours.[32] The use of the term "duty" in draft article 9 was welcomed for various reasons, especially in order to avoid any confusion with the concept of "responsibility"[33] and as the appropriate means of reconciling the two desiderata of preserving State sovereignty and protecting the affected population.[34] It was also said that the text would benefit from a specific reference to persons with disabilities.[35]

D. Draft article 10

24. Concerning draft article 10 (Duty of the affected State to seek assistance), many delegations welcomed establishing as legal, and not as moral or political, the duty of the affected State to seek assistance. They agreed that the duty established therein derived from the affected State's obligations under international human rights instruments and customary international law and that the protection of various human rights directly implicated in the context of disasters, such as the right to life,

---

[28] Algeria (A/C.6/66/SR.25, para. 32).

[29] Thailand (A/C.6/66/SR.24, para. 89).

[30] United States of America (A/C.6/66/SR.21, para. 69), Colombia (A/C.6/66/SR.22, para. 27), France (A/C.6/66/SR.23, para. 38), Netherlands (A/C.6/66/SR.23, para. 48), China (A/C.6/66/SR.23, para. 42), Chile (A/C.6/66/SR.24, para. 8), Argentina (A/C.6/66/SR.25, para. 10), Romania (A/C.6/66/SR.25, para. 17), Ireland (A/C.6/66/SR.25, para. 21), Algeria (A/C.6/66/SR.25, para. 31), European Union (A/C.6/66/SR.21, para. 55). Pakistan (A/C.6/66/SR.25, para. 6) characterized draft article 9 as the most essential provision of the draft articles implying the preference given to domestic law.

[31] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60).

[32] Romania (A/C.6/66/SR.25, para. 17).

[33] France (A/C.6/66/SR.23, para. 38), China (A/C.6/66/SR.23, para. 42), Algeria (A/C.6/66/SR.25, para. 31).

[34] Colombia (A/C.6/66/SR.22, para. 27).

[35] Greece (A/C.6/66/SR.24, para. 24).

food, health and medical care, was essential.[36] In this connection, it was recommended that among the human rights listed in the commentary a reference to the right to access to fresh water should be added.[37]

25. Since the affected State did not have unlimited discretion regarding its consent to external assistance, which it was obliged to seek if the disaster exceeded its response capacity, a suggestion was made that situations in which the affected State might be unwilling to provide assistance and protection should also be addressed.[38]

26. Attention was drawn to the Preamble of the European Union's Council Regulation No. 1257/96 concerning humanitarian aid, which stated: "people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief".[39]

27. It was suggested that the fact that the Government of an affected State was in the best position to determine the severity of a disaster and the limits of its own response capacity be reflected in the text of draft article 10.[40]

28. On the other hand, a number of States opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity. In their view, the imposition of such a duty constituted infringement of the sovereignty of States as well as of international cooperation and solidarity and had no basis in existing international law, customary law or State practice. It was preferable that the provision of draft article 10 be reworded in hortatory terms, namely, to use instead of the mandatory phrase "duty to seek assistance" the formulation "should seek assistance".[41]

29. As stated by one delegation, the relationship between the affected State and the international community in disaster situations should not be defined in terms of rights and duties, but should rather be considered from the perspective of international cooperation not only in draft article 10 but also in draft articles 11, paragraph 2, and 12.[42]

---

[36] Slovenia (A/C.6/66/SR.20, para. 11), Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), El Salvador (A/C.6/66/SR.22, para. 12), Colombia (A/C.6/66/SR.22, para. 27), Czech Republic (A/C.6/66/SR.23, para. 19), Chile (A/C.6/66/SR.24, para. 8), India (A/C.6/66/SR.25, para. 13), Romania (A/C.6/66/SR.25, para. 18), Ireland (A/C.6/66/SR.25, para. 21), Egypt (A/C.6/66/SR.25, para. 36), European Union (A/C.6/66/SR.21, para. 56), IFRC (A/C.6/66/SR.25, para. 41).

[37] Greece (A/C.6/66/SR.24, para 25).

[38] Netherlands (A/C.6/66/SR.23, para. 48), Slovenia (A/C.6/66/SR.20, para. 11), Portugal (A/C.6/66/SR.24, para. 66).

[39] European Union (A/C.6/66/SR.21, para. 56).

[40] France (A/C.6/66/SR.23, para. 38).

[41] Austria (A/C.6/66/SR.23, para. 23), Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 38), China (A/C.6/66/SR.23, para. 42), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Greece (A/C.6/66/SR.24, para. 25), Cuba (A/C.6/66/SR.24, para. 26), Russian Federation (A/C.6/66/SR.24, para. 37), Islamic Republic of Iran (A/C.6/66/SR.24, para. 50), Portugal (A/C.6/66/SR.24, para. 66), Indonesia (A/C.6/66/SR.24, para. 70), Republic of Korea (A/C.6/66/SR.24, para. 82), Thailand (A/C.6/66/SR.24, para. 90), Malaysia (A/C.6/66/SR.24, para. 114), Pakistan (A/C.6/66/SR.25, para. 7), Argentina (A/C.6/66/SR.25, para. 10), Algeria (A/C.6/66/SR.25, para. 33), Sri Lanka (A/C.6/66/SR.27, para. 19).

[42] China (A/C.6/66/SR.23, para. 42).

30. Some delegations drew attention to the importance of the last part of draft article 10, namely, that the affected State was free to choose among the various enumerated external actors offering assistance, as indicated by the phrase "as appropriate".[43] In that connection, the view was expressed that inclusion of the words "as appropriate" in the draft article contributed to strengthening the affected State's discretion in determining and choosing the best assistance provider, since an affected State was in the best position to determine the gravity of an emergency situation on its territory and to frame appropriate responses.[44] Conversely, a suggestion was made to exclude those words, so as to emphasize the discretionary power of the affected State.[45]

31. The opinion was expressed that the clause "to the extent that a disaster exceeds its national response capacity" raised questions as to the manner in which the national response capacity was assessed, and therefore it should be further elaborated.[46] In that connection, support was voiced for reverting to the wording originally proposed by the Special Rapporteur in his fourth report, "if the disaster exceeds its national response capacity".[47]

32. There were some additional suggestions in respect of draft article 10. One delegation proposed that the draft article should be reworded, so as to make it clear that States were free to request assistance from any of the enumerated actors or from others not mentioned in the draft article in the light of general human rights law.[48] For some delegations, it would be useful to provide incentives for the affected State to seek assistance at an even earlier stage in order to avoid delays in the provision of assistance.[49] It was also said that a distinction should be made between States and international organizations, on the one hand, and relevant non-governmental organizations on the other, since it was not incumbent on the affected State to seek assistance from the latter.[50]

E. Draft article 11

33. It was suggested that the words "without prejudice to article 10" be added at the beginning of draft article 11 (Consent of the affected State to external assistance) for the sake of harmony.[51]

34. General agreement was expressed with paragraph 1 of draft article 11, which reflected the core principle, fundamental to international law, that implementation of international relief assistance was contingent upon the consent of the affected State,

---

[43] Slovenia (A/C.6/66/SR.20, para.11), Chile (A/C.6/66/SR.24, para. 8), Malaysia (A/C.6/66/SR.24, para. 115).

[44] Malaysia (ibid).

[45] Thailand (A/C.6/66/SR.24, para. 90), International Federation of Red Cross and Red Crescent Societies (A/C.6/66/SR.25, paras. 41 and 42).

[46] El Salvador (A/C.6/66/SR.22, para. 12).

[47] Netherlands (A/C.6/66/SR.23, para. 48).

[48] IFRC (A/C.6/66/SR.25, para. 41).

[49] Italy (A/C.6/66/SR.21, para. 91), El Salvador (A/C.6/66/SR.22, para. 12).

[50] Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Argentina (A/C.6/66/SR.25, para. 10).

[51] Thailand (A/C.6/66/SR.24, para. 91).

which was fully in line with the principle of State sovereignty.[52] However, concern was manifested at imposing such a legal obligation, which could undermine the current practice of international cooperation and solidarity.[53]

35. The opinion was expressed that although the requirement to obtain the consent of the affected State was reasonable, it could cause delay in cases where rapid reaction was needed.[54] It was also stated that draft article 11 should categorically refuse to allow consent to be implied or dispensed completely in situations where a lack of consent would not bar the provision of assistance. The situation where there was no functioning government to provide consent might be acceptable from a humanitarian standpoint but raised questions as to who should decide whether a government, functioning or otherwise, existed.[55]

36. A number of States welcomed paragraph 2 of draft article 11 which stipulates that the consent to external assistance by the affected State should not be withheld arbitrarily, underlying that the affected State had both a right and a duty to assist its own population.[56]

37. In the opinion of one delegation, an additional study on the relationship between international cooperation and international principles would be helpful in establishing possible derogations to those of sovereignty and non-intervention. A State should bear the responsibility for its refusal to accept assistance, since such a refusal could give rise to an internationally wrongful act if it undermined the rights of the affected persons under international law.[57] It was explained by another delegation that the duties to cooperate, to seek assistance and to refrain from arbitrarily withholding consent imposed an obligation of conduct or means, not of result, on the affected State, which was obliged to give good faith consideration to the possibility of accepting assistance from another State or from an international actor and could not withhold its consent arbitrarily.[58] Another delegation concurred with this provision of draft article 11 but warned that under existing international law other States would not be able to act without the consent of the affected State, even if the latter incurred international responsibility by refusing assistance.[59]

38. Some delegations insisted that, based on the principle of sovereignty, the affected State had a right to decide whether to request or accept humanitarian assistance and that no customary international law or State practice provided for the

---

[52] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), El Salvador (A/C.6/66/SR.22, para. 13), Colombia (A/C.6/66/SR.22, para. 27), Czech Republic (A/C.6/66/SR.23, para. 19), Austria (A/C.6/66/SR.23, para. 24), Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 39), Niger (A/C.6/66/SR.25, para. 54), Chile (A/C.6/66/SR.24, para. 9), India (A/C.6/66/SR.25, para. 13), Romania (A/C.6/66/SR.25, para. 19), Pakistan (A/C.6/66/SR.25, para. 6), Ireland (A/C.6/66/SR.25, para. 22), Egypt (A/C.6/66/SR.25, para. 36), Sri Lanka (A/C.6/66/SR.27, para. 20), European Union (A/C.6/66/SR.21, para. 56), IFRC (A/C.6/66/SR.25, para. 43).

[53] China (A/C.6/66/SR.23, para. 42), Russian Federation (A/C.6/66/SR.24, para. 37), Portugal (A/C.6/66/SR.24, para. 66), Pakistan (A/C.6/66/SR.25, para. 7).

[54] Niger (A/C.6/66/SR.23, para. 54).

[55] Malaysia (A/C.6/66/SR.24, para. 116).

[56] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21 para. 60), El Salvador (A/C.6/66/SR.22, para. 13), Spain (A/C.6/66/SR.23, para. 50).

[57] Portugal (A/C.6/66/SR.24, para. 66).

[58] Colombia (A/C.6/66/SR.22, para. 27).

[59] Austria (A/C.6/66/SR.23, para. 24).

obligation on the part of an affected State to accept outside assistance.[60] One delegation preferred that the draft articles, rather than imposing a strictly legal obligation that would entail international legal consequences in the event of non-compliance, should determine that the affected State had simply a moral and political duty to seek assistance and not to withhold arbitrarily its consent to external assistance.[61]

39. A number of delegations considered that the term "arbitrarily" in paragraph 2 of the draft article could give rise to difficulties of interpretation, including the questions on how arbitrary refusal would be determined, who was to make such an assessment, or what its consequences would be, among others, and therefore it should be clarified in both the text and the commentary.[62]

40. Some delegations made concrete suggestions of a textual nature. Thus, it was felt worth considering whether the term "unreasonably" should be substituted for "arbitrarily".[63] Also, to add an explanation to the text as follows: "Consent is considered to be arbitrary, in particular when in contravention of article 8".[64] In the opinion of one delegation, no refusal was arbitrary, for instance, if the affected State had previously accepted appropriate assistance from another source. In its view, the necessary guarantees should be provided, including by underlining the relevant principles of the Charter of the United Nations, to ensure that the cause of humanitarian assistance was not abused with a view to undermining the sovereign rights of the affected State and interfering in its internal affairs. It was, thus, suggested that paragraph 2 should be amended to read: "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably".[65]

41. With reference to paragraph 3 of article 11, some States argued that the expression "whenever possible" could raise difficulties in communicating the decision regarding the acceptance of assistance, adversely affecting populations in urgent need of such assistance. The affected State's discretion in communicating such decision should be narrowed in order to cover cases where a decision proved impossible. It would help to clarify who was expected to make a formal offer of assistance to the affected State.[66]

42. One delegation proposed to divide paragraph 3 in order to express two distinct ideas: first, that the State had a duty to communicate its response to an offer of assistance in a timely manner; and, second, that in extreme situations States might, for good cause, not be able to respond immediately, or indeed at all, to an offer of

---

[60] Cuba (A/C.6/66/SR.24, para. 27), Indonesia (A/C.6/66/SR.24, para. 70), China (A/C.6/66/SR.23, para. 42).

[61] Russian Federation (A/C.6/66/SR.24, para. 37).

[62] Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 39), China (A/C.6/66/SR.23, para. 42), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48). Malaysia (A/C.6/66/SR.24, paras. 117-119), Argentina (A/C.6/66/SR.25, para. 10), Ireland (A/C.6/66/SR.25, para. 22), Algeria (A/C.6/66/SR.25, para. 33) and Sri Lanka (A/C.6/66/SR.27, para. 20).

[63] Netherlands (A/C.6/66/SR.23, para. 48).

[64] Greece (A/C.6/66/SR.24, para. 25).

[65] Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Thailand (A/C.6/66/SR.24, para. 91).

[66] El Salvador (A/C.6/66/SR.22, para. 13), France (A/C.6/66/SR.23, para. 39), Portugal (A/C.6/66/SR.24, para. 66), Thailand (A/C.6/66/SR.24, para. 91), IFRC (A/C.6/66/SR.25, para. 43).

assistance.[67] It was explained that neither the Red Cross and Red Crescent Movement nor foreign non-governmental organizations tend to make formal offers of assistance to States. It was also stated that it was unclear in draft article 11 whether there was an implied temporal deadline for responding to offers of assistance.[68]

43. The suggestion was made that the order of draft articles 11 and 12 should be reversed, with the right of third States and other entities to offer assistance being stated first.[69]

F. The right to offer assistance (proposed draft article 12)

44. A number of delegations addressed the inclusion of a further draft article on the right of assisting actors to offer assistance to the affected State, as proposed by the Special Rapporteur in his fourth report (proposed draft article 12) (A/CN.4/643 and Corr.1, para. 109). As already explained (see para. 9 above), proposed article 12 has been considered by the Commission in plenary, which referred it to the Drafting Committee. Agreement was expressed by many States with such proposal, maintaining that it acknowledged the interest of the international community in the protection of persons in the event of a disaster, which should be viewed as complementary to the primary responsibility of the affected State and as an expression of solidarity and cooperation and not as interference in its internal affairs. It was stressed that this right of assisting actors was merely to "offer", not to "provide", assistance and the affected State remained, in line with the principle of sovereignty and notwithstanding draft articles 10 and 11, free to accept in whole or in part any offers of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal.[70] A suggestion was made that the proposed draft article should be reformulated so as to extend the right to offer assistance to all persons, both natural and legal.[71]

45. One delegation added that offers of assistance should not be considered as interference in the internal affairs of the affected State, provided that the assistance offered did not affect the latter's sovereignty or its primary role in the direction, control, coordination and supervision of such assistance.[72] A suggestion was made to formulate this provision as a positive duty of the international community, this being a part of international cooperation.[73] In that connection, it was stressed that draft article 5 already established a duty of cooperation on the part of all actors; therefore draft articles 5 and 12, taken together, would put States and other actors under some pressure to offer assistance, which was only to be welcomed.[74]

---

[67] El Salvador (ibid.).

[68] IFRC (A/C.6/66/SR.25, para. 43).

[69] Netherlands (A/C.6/66/SR.23, para. 48).

[70] Slovenia (A/C.6/66/SR.20, para. 12), Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), Poland (A/C.6/66/SR.21, para. 86), Mexico (A/C.6/66/SR.22, para. 20), Czech Republic (A/C.6/66/SR.23, para. 19), Austria (A/C.6/66/SR.23, para. 25), Chile (A/C.6/66/SR.24, para. 10), Romania (A/C.6/66/SR.25, para. 19), Egypt (A/C.6/66/SR.25, para. 36).

[71] El Salvador (A/C.6/66/SR.22, para. 14).

[72] Chile (A/C.6/66/SR.24, para. 10).

[73] Thailand (A/C.6/66/SR.24, para. 92), Sri Lanka (A/C.6/66/SR.27, para. 20).

[74] Austria (A/C.6/66/SR.23, para. 25).

46. Some delegations, however, agreed only with the general premise articulated in the draft article and urged to limit its applicable scope and conditions, without undermining the principle of non-interference in the internal affairs of the affected State.[75] In that connection, it was suggested that the scope should be reduced to the "offer of assistance".[76]

47. A number of States considered that the role of the international community in offering assistance to affected States should not be defined as an assertion of rights, and therefore should be reformulated on the basis of the principles of international cooperation and solidarity.[77] Some also emphasized that the focus should be on the duty of the affected State to give consideration to offers of assistance, rather than as a legal right.[78] It was also stated that the right to offer assistance set out in draft article 12 had no evident independent value but simply recognized the reality in disaster situations.[79]

48. Moreover, in the view of some of delegations, it was appropriate to consider whether all of the actors mentioned in the text should be placed on the same juridical footing, since only subjects of international law were entitled to exercise the right to offer assistance.[80] In that connection, it was noted that those three groups of actors had been placed in the same category in draft article 7 on human dignity.[81]

49. It was also pointed out that IFRC and its national societies did not fall within the categories mentioned in draft article 12.[82] In addition, as already mentioned (see above, para. 14), it was felt necessary to consider whether the term "competent intergovernmental organizations" extended to regional integration organizations, such as the European Union.[83]

50. For some delegations, the provision was superfluous since States already had a sovereign right to make such offers in practice.[84] One delegation suggested that owing to the diverging views, the Commission should avoid a definitive

---

[75] Poland (A/C.6/66/SR.21, para. 86), Mexico (A/C.6/66/SR.22, para. 20), Austria (A/C.6/66/SR.23, para. 25), Chile (A/C.6/66/SR.24, para. 10), Romania (A/C.6/66/SR.25, para. 19)

[76] Austria (A/C.6/66/SR.23, para. 25).

[77] United States of America (A/C.6/66/SR.21, para. 69), Singapore (A/C.6/66/SR.21, para. 75), El Salvador (A/C.6/66/SR.22, para. 14), Germany (A/C.6/66/SR.23, para. 28), Israel (A/C.6/66/SR.23, para. 33), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Russian Federation (A/C.6/66/SR.24, para. 37), Portugal (A/C.6/66/SR.24, para. 66), Thailand (A/C.6/66/SR.24, para. 92), Pakistan (A/C.6/66/SR.25, para. 7), Sri Lanka (A/C.6/66/SR.27, para. 20), IFRC (A/C.6/66/SR.25, para. 44).

[78] Singapore (A/C.6/66/SR.21, para. 75), Thailand (A/C.6/66/SR.24, para. 92).

[79] Russian Federation (A/C.6/66/SR.24, para. 37).

[80] Singapore (A/C.6/66/SR.21, para. 75), Mexico (A/C.6/66/SR.22, para. 20), Czech Republic (A/C.6/66/SR.23, para. 19), Germany (A/C.6/66/SR.23, para. 28), Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Pakistan (A/C.6/66/SR.25, para. 7), European Union (A/C.6/66/SR.21, para. 57).

[81] Czech Republic (ibid.).

[82] IFRC (A/C.6/66/SR.25, para. 44).

[83] European Union (ibid.).

[84] United Kingdom (A/C.6/66/SR.23, para. 45), Russian Federation (A/C.6/66/SR.24, para. 37).

pronouncement on those issues in the interest of facilitating the development of a product that would be of the most practical use to the international community.[85]

G. Duty to provide assistance (question posed by the Commission in chapter III.C of its 2011 annual report)

51. The Commission, at the penultimate meeting of its 2011 session (3126th meeting), on 11 August 2011, and in the absence of the Special Rapporteur on the topic "Protection of persons in the event of disasters", agreed to the proposal of one member[86] to also include in section C of chapter III of its report on the session, entitled "Specific issues on which comments would be of particular interest to the Commission", the following question addressed to States:

> "The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?" (A/66/10, chap. III, para. 44).

52. No written replies to the above question had been received from States by the date of the present report. However, in the Sixth Committee, the many States that spoke on the point responded in the negative to the question posed, mainly arguing that such a duty had no basis in existing international law, customary law or practice, and that the creation of such a new duty would not only be controversial but would give rise to numerous legal and practical problems.[87]

53. The view was expressed that the duty to cooperate should in this context be understood simply as a duty to consider requests for assistance made by the affected State, and was conditional upon a decision by the affected State that it required assistance and also upon the capacity of the assisting State to provide the assistance requested.[88] Some suggestions were advanced to formulate the provision in a way to encourage or strongly recommend to non-affected actors cooperation and assistance on the basis of the principles of cooperation and international solidarity,[89] or to only oblige States to "respond promptly" to a request made by the affected State. In the latter respect, reference was made to article 4 of the 2005 Agreement of the Association of Southeast Asian Nations (ASEAN) on Disaster Management and Emergency Response.[90] It was also underlined that the question posed would have an impact on the practical operation of draft articles 10 and 11, since the duty to seek assistance in the event of disasters would need to be mutually supported by a corresponding duty to assist. Nevertheless, a binding obligation on States to provide

---

[85] United States of America (A/C.6/66/SR.21, para. 69).

[86] See A/CN.4/SR.1326.

[87] Mexico (A/C.6/66/SR.18, para. 55, and A/C.6/66/SR.22, para. 21), Slovenia (A/C.6/66/SR.20, para. 12), Singapore (A/C.6/66/SR.21, para. 76), Italy (A/C.6/66/SR.21, para. 91), Colombia (A/C.6/66/SR.22, para. 28), Austria (A/C.6/66/SR.23, para. 23), Germany (A/C.6/66/SR.23, para. 28), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Spain (A/C.6/66/SR.23, para. 50), Hungary (A/C.6/66/SR.24, para. 59), Malaysia (A/C.6/66/SR.24, para. 120), Republic of Korea (A/C.6/66/SR.24, paras. 120 and 121), Ireland (A/C.6/66/SR.25, para. 21).

[88] Mexico (A/C.6/66/SR.18, para. 55, and A/C.6/66/SR.22, para. 21), Colombia (A/C.6/66/SR.22, para. 28).

[89] Hungary (A/C.6/66/SR.24, para. 59), Poland (A/C.6/66/SR.21, para. 86).

[90] Singapore (A/C.6/66/SR.21, para. 76).

assistance upon request could be deemed unacceptable interference in a State's sovereign decision-making.[91]

54. Support was expressed for the Special Rapporteur's earlier understanding of the duty to cooperate.[92]

III. The Special Rapporteur's position on the Commission's question in chapter III.C of its 2011 annual report

55. It falls now upon the Special Rapporteur to address the Commission's question in the light of relevant State practice and the comments made by States in response to that inquiry. As a starting point, it must be recalled that draft articles 5 and 10, provisionally adopted, enshrine the duty to cooperate and the duty of affected States to seek assistance, respectively. The issue singled out by the Commission involves the interrelationship between the legal duties established in both draft articles.

56. In this respect, international practice as evidenced in international treaties shows that, although underpinned by the principles of solidarity and cooperation, the provision of assistance from one State to another upon the latter's request is premised on the voluntary character of the action of the assisting State. In this sense, article 4, paragraph 3, of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations[93] provides that:

> "Each State Party to which a request for telecommunication assistance is directed, either directly or through the operational coordinator, shall promptly determine and notify the requesting State Party whether it will render the assistance requested, directly or otherwise, and the scope of, and terms, conditions, restrictions and cost, if any, applicable to such assistance."

57. In more explicit terms, the 2005 ASEAN Agreement on Disaster Management and Emergency Response[94] establishes in article 9, paragraph 1:

> "On a voluntary basis, each Party shall earmark assets and capacities, which may be available for the regional standby arrangements for disaster relief and emergency response, such as:
>
> a. emergency response/search and rescue directory;
>
> b. military and civilian assets;
>
> c. emergency stockpiles of disaster relief items; and
>
> d. disaster management expertise and technologies."

58. In the above-mentioned instruments, it is made clear that the provision of assistance from one State to another must be given voluntarily and thus, no positive obligation to assist exists for the parties thereto. This practice is recognized by the

---

[91] Malaysia (A/C.6/66/SR.24, para. 120).

[92] Netherlands (A/C.6/66/SR.23, para. 48).

[93] United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 48. Hereinafter the Tampere Convention.

[94] ASEAN Documents Series 2005, p. 160. Hereinafter the ASEAN Agreement.

Institut de droit international in article V of its 2003 resolution on humanitarian assistance,[95] according to which:

> "1. All States should to the maximum extent possible offer humanitarian assistance to the victims in States affected by disasters, except when such assistance would result in seriously jeopardizing their own economic, social or political conditions. Special attention should be paid to disasters affecting neighbouring States.
>
> 2. Intergovernmental organizations shall offer humanitarian assistance to the victims of disasters in accordance with their own mandates and statutory mandates."

59. In this formulation, the hortatory term "should" regarding the provision of assistance by States stands in marked contrast with the mandatory formulation "shall" used when referring to intergovernmental organizations. Such differentiation implies that, although a duty to provide assistance may exist for intergovernmental organizations when their mandates so provide, no such duty exists for States. In this respect, States remain free to decide whether or not to provide assistance, even if requested to do so by an affected State.

60. Furthermore, the statement of the Institut de droit international that States should offer humanitarian assistance "except when such assistance would result in seriously jeopardizing their own economic, social or political conditions" indicates that the limits of a State's capabilities are a pivotal criterion for the provision of humanitarian assistance. An obligation to provide assistance formulated in the abstract might represent in practice an excessive burden for those States which may not be in the position to adequately and effectively discharge their primary obligation towards their own populations, much less a duty towards those of third States. Solidarity and cooperation are of course central to the protection of persons in the event of disasters, which, as has been noted by the Special Rapporteur in his fourth report (A/CN.4/643, para. 80), is a project of the international community as a whole. However, they cannot be understood in such a way as to impair the capacity of States to comply, by virtue of their sovereignty, with their primary obligation towards their own people.

61. The limitation premised on the restricted capabilities of States finds confirmation in several international instruments. Among them the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[96] which stipulates in article 2, paragraph 4, that:

> "States Parties shall, within the limits of their capabilities, identify and notify the Agency of experts, equipment and materials which could be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency as well as the terms, especially financial, under which such assistance could be provided."

---

[95] See B. Vukas (Rapporteur), "Humanitarian Assistance", Resolution, Institut de droit international, Sixteenth Commission (2003), p. 6.

[96] United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 135. Hereinafter the Nuclear Accident Convention.

62. In turn, the aforementioned ASEAN Agreement[97] embodies, in article 3, paragraph 3, the guiding principle that:

> "The Parties shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to achieve the objectives of this Agreement."

63. And further, article 11, paragraph 6,[98] provides that:

> "The Parties shall, within the limits of their capabilities, identify and notify the AHA Centre of military and civilian personnel, experts, equipment, facilities and materials which could be made available for the provision of assistance to other Parties in the event of a disaster emergency as well as the terms, especially financial, under which such assistance could be provided."

64. The limitation is also recognized by the United Nations Committee on Economic, Social and Cultural Rights, which states in paragraph 40 of its General Comment No. 14 (2000),[99] regarding the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), that:

> "States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities."

65. Similarly, the Committee, in paragraph 38 of General Comment No. 12 (1999),[100] referring to the right to adequate food (article 11 of the International Covenant on Economic, Social and Cultural Rights), stated that:

> "States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability."

66. Moreover, the same principle is also found, albeit implicitly, in the aforementioned Tampere Convention,[101] which provides in article 4, paragraph 2, that:

> "A State Party requesting telecommunication assistance shall specify the scope and type of assistance required and those measures taken pursuant to Articles 5 and 9 of this Convention, and, when practicable, provide the State Party to which the request is directed and/or the operational coordinator with any other information necessary to determine the extent to which such State Party is able to meet the request."

---

[97] See footnote 94 above.

[98] Ibid., p. 161.

[99] E/C.12/2000/4.

[100] E/C.12/1999/5.

[101] See footnote 93 above.

67. In this respect, in the Sixth Committee, among the many delegations denying that a duty to provide assistance upon request by an affected State does currently exist in the realm of international law, some explicitly held that view, invoking as reasons for the denial considerations based on the limits to the national capacity of States to provide assistance.

68. In the light of the preceding considerations, the Special Rapporteur cannot but reaffirm the conclusion he had already arrived at when preparing his fourth report, that the duty to cooperate in relief matters does not currently include a legal duty for States to provide assistance when requested by an affected State. This conclusion is confirmed by the overwhelming majority of States that submitted comments in the Sixth Committee in response to the Commission's inquiry, with the delegations of Mexico,[102] Slovenia,[103] Singapore,[104] Italy,[105] Switzerland,[106] Colombia,[107] Austria,[108] Germany,[109] the United Kingdom,[110] the Netherlands,[111] Spain,[112] Hungary,[113] the Republic of Korea,[114] Malaysia[115] and Ireland[116] clearly manifesting their firm belief that no such duty exists under general international law. While other delegations — Poland,[117] Thailand,[118] Pakistan,[119] and Sri Lanka[120] — expressed views somewhat more nuanced on the subject, it must be pointed out that, in doing so, they were not admitting the existence of a duty of States to "provide" assistance upon request but were rather addressing the quite distinct issue of the possible existence of a duty to "offer" assistance.

69. The foregoing notwithstanding, it must also be noted that by means of mutual arrangements States may accept the imposition of such a duty as between the Parties thereto. Indeed, this possibility is implicitly recognized in the aforementioned article V of the 2003 resolution of the Institut de droit international on humanitarian assistance.[121] By affirming that States "should" offer assistance while intergovernmental organizations "shall" do so in accordance with their own mandates, the Institut admits that States may agree to impose on intergovernmental organizations of which they are members the positive obligation to provide assistance upon request.

---

[102] A/C.6/66/SR.18, para. 55.
[103] A/C.6/66/SR.20, para. 12.
[104] A/C.6/66/SR.21, para. 76.
[105] A/C.6/66/SR.21, para. 91.
[106] A/C.6/66/SR.22, para. 21.
[107] A/C.6/66/SR.22, para. 28.
[108] A/C.6/66/SR.23, para. 23.
[109] A/C.6/66/SR.23, para. 28.
[110] A/C.6/66/SR.23, para. 45.
[111] A/C.6/66/SR.23, para. 48.
[112] A/C.6/66/SR.23, para. 50.
[113] A/C.6/66/SR.24, para. 59.
[114] A/C.6/66/SR.24, para. 82.
[115] A/C.6/66/SR.24, paras. 114 and 120-121.
[116] A/C.6/66/SR.25, para. 21.
[117] A/C.6/66/SR.21, para. 86.
[118] A/C.6/66/SR.24, para. 92.
[119] A/C.6/66/SR.25, para. 7.
[120] A/C.6/66/SR.27, para. 20.
[121] See footnote 95 above.

70. Such a possibility is also recognized in the 1986 Nuclear Accident Convention, which in article 1, paragraph 2, after formulating a general duty to cooperate to facilitate prompt assistance in the event of a nuclear accident or radiological emergency, disposes that:

> "To facilitate such cooperation States Parties may agree on bilateral or multilateral arrangements or, where appropriate, a combination of these, for preventing or minimizing injury and damage which may result in the event of a nuclear accident or radiological emergency."

71. Inter-State agreements have been concluded establishing a duty to provide assistance on request as between the Parties thereto. Among them, mention may be made of the 1991 Agreement Establishing the Caribbean Disaster Emergency Response Agency (CDERA)[122] of the Caribbean Community, article 13 of which reflects the obligation undertaken by the participating States:

> "To identify, maintain in a state of readiness and make available immediately on request by the Coordinator relevant material and human resources in the event of disaster."

72. Another example may be found in the 2008 Consolidated Version of the Treaty on the Functioning of the European Union,[123] whose article 222, paragraph 2, provides that:

> "Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council."

73. Finally, the Special Rapporteur wishes to address the issue raised in the Sixth Committee by some delegations[124] which endorsed the view that, although there is no duty to provide assistance upon request, there may exist a duty to give due consideration to requests for assistance from an affected State. There is some evidence in practice to found that position.

74. Thus, the 1986 Nuclear Accident Convention provides, in article 2, paragraph 3, that:

> "Each State Party to which a request for such assistance is directed shall promptly decide and notify the requesting State Party, directly or through the Agency, whether it is in a position to render the assistance requested, and the scope and terms of the assistance that might be rendered."

75. In the same sense, article 4, paragraph 3, the Tampere Convention provides that each party to which a request for assistance is directed "shall promptly determine and notify the requesting State Party whether it will render the assistance requested, directly or otherwise".

76. More recently, the ASEAN Agreement incorporated a similar provision, establishing in article 4, paragraph c, that in pursuing the objectives of the

---

[122] United Nations, *Treaty Series*, vol. 2236, No. 40212, p. 62. Hereinafter the CDERA Agreement.

[123] *Official Journal of the European Union*, C 115/47.

[124] Singapore (A/C.6/66/SR.21, para. 76), Mexico (A/C.6/66/SR.18, para. 55), Colombia (A/C.6/66/SR.22, para. 28), Spain (A/C.6/66/SR.23, para. 50).

Agreement, the Parties shall: "promptly respond to a request for assistance from an affected Party".

77. And further, article 11, paragraph 4, disposes that:

> "Each Party to which a request for assistance is directed shall promptly decide and notify the Requesting Party, directly or through the AHA Centre, whether it is in a position to render the assistance requested, and of the scope and terms of such assistance."

78. Pending the conclusion of the Commission's consideration of the Special Rapporteur's proposal for draft article 12, it does not appear necessary to him to indicate at the present stage a definitive position on the last issue discussed above. At any rate, the actions of an assisting State are, as much as those of an affected State, subject to the fulfilment of the principle of good faith, to which reference has been made in paragraph (9) of the Commentary to draft article 10.

IV. Elaboration on the duty to cooperate

79. In response to comments made in the Sixth Committee, as summarized above (see, in particular, paragraphs 17, 28-29, 37, 45, 47 and 53), the Special Rapporteur will proceed now to a further elaboration on the duty to cooperate, enshrined in draft article 5.

80. As discussed in the previous reports of the Special Rapporteur, cooperation plays a central role in the context of disaster relief, and is an imperative for the effective and timely response to disaster situations. Such essential role lends itself to further elaboration of the functional requirements of the duty to cooperate outlined in draft article 5 and the kind of coordination required by affected States and assisting actors.

81. The present analysis is, therefore, an attempt to identify the contours of the duty of cooperation in draft article 5. Admittedly, the nature of cooperation has to be shaped by its purpose, which in the present context is to provide disaster relief assistance. Seen from the larger perspective of public international law, to be legally and practically effective the States' duty to cooperate in the provision of disaster relief must strike a fine balance between three important aspects. First, such a duty cannot intrude into the sovereignty of the affected State. Second, the duty has to be imposed on assisting States as a legal obligation of conduct. Third, the duty has to be relevant and limited to disaster relief assistance, by encompassing the various specific elements that normally make up cooperation on this matter.

A. The nature of cooperation and respect for the affected State's sovereignty

82. By its very nature, cooperation is likely to appear in conflict with the sovereign prerogatives of the recipient State. For example, food access to domestic populations or the use of foreign search and rescue teams might both be regarded as offensive to the traditional notion of State sovereignty. The legitimate concern to give its due to the affected State's sovereignty has been examined extensively in the Special Rapporteur's previous reports and the earlier discussions in the Commission.

Therefore, while reaffirming that, as such, this issue remains a central consideration regarding the nature of cooperation, the present section needs to touch on it rather briefly.

83. Any attempt to provide disaster relief must take cognizance of the principle of sovereignty. In order to respect and safeguard the sovereignty of the affected State, article 5 disposes that cooperation will be implemented "[i]n accordance with the present draft articles". Consequently, cooperation will have to be extended in conformity with draft article 9, which places the affected State, "by virtue of its sovereignty", at the forefront of all disaster relief assistance, limiting other interested actors to a complementary role.

84. The attempt to provide for assistance while respecting the sovereignty of the affected State is not a novel concept in international law. As indicated in paragraph (1) of the commentary to draft article 5 (A/65/10, para. 331, article 5, commentary), the Charter of the United Nations balances both concepts of sovereignty (Article 2 (1)), and international cooperation (Articles 1 (3), 13, 55 and 56). Similar balancing is achieved in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[125] Likewise, such balance is reflected in General Assembly resolution 46/182 of 1991 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations and in the Tampere Convention.

B. The duty to cooperate, an obligation of conduct

85. The duty to cooperate is also embodied in article 17 of the final draft articles on the Law of Transboundary Aquifers, adopted by the Commission at its sixtieth session (A/63/10, chap. IV.E, paras. 53 and 54). Paragraph 4 of the article reads:

> "States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."

86. The article calls for States to provide "scientific, technical, logistical and other cooperation" to other States experiencing an emergency, in order to ensure the protection of an aquifer. It expands upon the general obligation to cooperate in draft article 7 by describing the cooperation necessary between affected States and assisting actors in emergency situations. The commentary to article 17 indicates that the Commission established an obligation "of conduct and not result". The commentary further states that the "[a]ssistance required would relate to coordination of emergency actions and communication, providing trained emergency response personnel, response equipment and supplies, extending scientific and technical expertise and humanitarian assistance".

87. The ASEAN Declaration on Mutual Assistance on Natural Disasters of 1976[126] contains similar language and provides that "the Member Countries shall, within

---

[125] General Assembly resolution 2625 (XXV) (1970).

[126] Available from www.aseansec.org. Hereinafter the 1976 ASEAN Declaration.

their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance".

88. The establishment of an obligation of conduct rather than one of result appears in various United Nations instruments. The General Assembly, in paragraph 12 of the annex to resolution 46/182 of 1991, called for the United Nations to adopt a coordinating role in the provision of emergency aid, but not for specific attainments as a result of that coordination. The Declaration on the Establishment of a New International Economic Order (1974) focuses on conduct in its call for "[t]he strengthening, through individual and collective actions, of mutual economic, trade, financial and technical cooperation among the developing countries."[127]

89. The Economic and Social Council, in resolution 2008/36 of 25 July 2008 dealing with emergency humanitarian assistance, also called for specific conduct without envisaging any specific outcome, when it:

> "*Encourages* Member States to create and strengthen an enabling environment for the capacity-building of their national and local authorities, national societies of the Red Cross and Red Crescent, and national and local non-governmental and community-based organizations in providing timely humanitarian assistance, and also encourages the international community, the relevant entities of the United Nations system and other relevant institutions and organizations to support national authorities in their capacity-building programmes, including through technical cooperation and long-term partnerships based on recognition of their important role in providing humanitarian assistance".[128]

90. Several multilateral conventions prioritize the establishment of an obligation of conduct. The States parties to the Tampere Convention, for example, agree, in article 2 (c), to "the provision of prompt telecommunication assistance to mitigate the impact of a disaster", but not to the functioning of a given type of telecommunications network. For its part, the ASEAN Agreement, which has detailed provisions on the methods of technical and scientific cooperation, does not turn any of those provisions into obligations. Instead of, for example, agreeing to standardize their reporting methods by a certain date, the members of ASEAN agree, in article 18.1 b of the ASEAN Agreement, to "promote the standardization of the reporting format of data and information". Similarly, obligations of conduct and not result are found in the 2006 Convention on the Rights of Persons with Disabilities[129] and the 1986 Nuclear Accident Convention.

91. Outside the realm of international disaster relief law proper, the obligation to cooperate as an obligation of conduct and not one of result is also embodied in bilateral treaties. Among the many examples, suffice it to mention the United States-Mexico Treaty on Agriculture, which commits both States to cooperation on

---

[127] General Assembly resolution 3201 (S-VI), para. 4 (s).

[128] Economic and Social Council resolution 2008/36, entitled "Strengthening of the coordination of emergency humanitarian assistance of the United Nations", para. 2.

[129] United Nations, *Treaty Series*, vol. 2515, No. 44910.

fumigation of pears, and not to the eradication of the Oriental Moth.[130] The European Union-United States Agreement on Controlled Substances calls for "technical cooperation … in particular, training and exchange programmes for the officials concerned", but not in requiring that those officials pass a certain predetermined knowledge test.[131]

92. In line with other relevant international legal obligations, by its very nature, cooperation regarding the protection of persons in the event of disasters implies an obligation of conduct and not one of result.

C. Categories of cooperation

93. In the context of the present topic, the duty to cooperate has a well-defined goal, i.e., to protect persons in the event of disasters. To meet this goal in practice, the duty to cooperate most often covers activities such as "medical care, food agricultural training, disaster relief, shelter, education, clothing, water, professional exchanges, institutional reform, technical assistance, and support of human rights and civil liberties".[132] The duty to cooperate must be understood as encompassing a great variety of coordinating, technical, scientific and logistical activities. Guidance as to the extent of such activities under draft article 5 can be found in other related international legal rules that specify the nature of the cooperation involved.

94. Cooperation has been addressed in specific terms in various United Nations instruments. The General Assembly, in paragraph 27 of the annex to resolution 46/182, explained how the United Nations should adopt a coordinating role and — as an indicative list — should "establish a central register of all specialized personnel and teams of technical specialists, as well as relief supplies, equipment and services available within the United Nations system and from Governments and intergovernmental and non-governmental organizations, that can be called upon at short notice by the United Nations". The Declaration on the Establishment of a New International Economic Order calls, in turn, for, inter alia, the strengthening of "technical cooperation". Such cooperation was also called for by the Economic and Social Council in resolution 2008/36, which focused on humanitarian assistance. The last two instruments, however, do not elaborate on the meaning of "technical cooperation".

95. Some multilateral conventions refer to specific categories of cooperation without accompanying them by indicative or exhaustive lists. For example, the International Covenant on Economic, Social and Cultural Rights refers to economic and technical cooperation (article 2) and to the creation of specific programmes on

---

[130] State Department No. 02-50, 2002 WL 1517444 (Treaty), Memorandum of understanding between the United States Department of Agriculture and the Office of the United States Trade Representative, and the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Food and the Secretariat of Economy of the United Mexican States regarding areas of food and agricultural trade (2002).

[131] State Department No. 97-119, 1997 WL 529522 (Treaty), Agreement between the United States of America and the European Community on Precursors and Chemical Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances (2007).

[132] Christine Holland Anthony, "The Responsible Role for the International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks", *Vanderbilt Journal of Transnational Law*, Vol. 9 (2006), p. 911.

the problem of hunger (article 11).[133] A series of environmental conventions also call for coordination on the basis of such general categories. The Stockholm Declaration on the Human Environment (1972) provides for "accelerated development through financial and technological assistance", which "includes scientific information and expertise relevant to mitigating environmental degradation".[134] The Vienna Convention for the Protection of the Ozone Layer calls for information-sharing among all State parties of scientific, technical, socioeconomic, commercial and legal information relevant to that Convention.[135] Finally, the Montreal Protocol appeals to developed nations to provide financial assistance and technology to less-developed nations.[136]

96. Other multilateral treaties provide more detailed examples which help to clarify the general categories of cooperation which they identify. The 2006 Convention on the Rights of Persons with Disabilities indicates, in article 32 (d), that "technical and economic assistance" includes "facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies".[137] Similarly, the Tampere Convention, in article 3, paragraph 2 (c), calls for "the provision of prompt telecommunication assistance to mitigate the impact of a disaster", to be accomplished by means such as "the installation and operation of reliable, flexible telecommunication resources to be used by humanitarian relief and assistance organizations" (article 3, paragraph 2 (d)).

97. In an even more detailed fashion, article 18 of the ASEAN Agreement holds that:

> "Technical Co-operation
>
> "1. In order to increase preparedness and to mitigate disasters, the Parties shall undertake technical co-operation, including the following:
>
> a. facilitate mobilisation of appropriate resources both within and outside the Parties;
>
> b. promote the standardisation of the reporting format of data and information;
>
> c. promote the exchange of relevant information, expertise, technology, techniques and know-how;
>
> d. provide or make arrangements for relevant training, public awareness and education, in particular, relating to disaster prevention and mitigation;
>
> e. develop and undertake training programmes for policy makers, disaster managers and disaster responders at local, national and regional levels; and
>
> f. strengthen and enhance the technical capacity of the Parties to implement this Agreement.

---

[133] United Nations, *Treaty Series*, vol. 993, No. 14531, articles 2 and 11, respectively.

[134] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (A/CONF.48/14/Rev.1), part one.

[135] Vienna Convention for the Protection of the Ozone Layer (1985), art. 4.1.

[136] Montreal Protocol on Substances that Deplete the Ozone Layer (1987), art. 8.

[137] See footnote 129 above.

> 2. The AHA Centre shall facilitate activities for technical co-operation as identified in paragraph 1 above."

98. The 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides general headings for the type of cooperation it envisages and a detailed list of actions under each heading. For example, it allows the International Atomic Energy Agency (IAEA) to:

> "assist a State Party or a Member State when requested in any of the following or other appropriate matters:
>
> - preparing both emergency plans in the case of nuclear accidents and radiological emergencies and the appropriate legislation;
> - developing appropriate training programmes for personnel to deal with nuclear accidents and radiological emergencies;
> - transmitting requests for assistance and relevant information in the event of a nuclear accident or radiological emergency;
> - developing appropriate radiation monitoring programmes, procedures and standards;
> - conducting investigations into the feasibility of establishing appropriate radiation monitoring systems;".

While not exhaustive, the foregoing list gives a clear indication of many forms of cooperation allowing, by analogy, an evaluation of other possible forms.

99. In other fields, most bilateral agreements that call for some form of technical cooperation provide a list with the types of assistance that such cooperation encompasses. For example, the International Tribunal for the Former Yugoslavia concluded agreements with domestic jurisdictions to provide technical assistance and evidence for domestic trials. Those agreements mentioned the type of technical assistance involved. Additionally, the United States-Mexico Agreement on Agriculture enumerated specific types of activities such as fumigation,[138] while the United States-South Korea Agreement on Science and Technology explained that cooperation included "research, exchanges of scientific information, scientific visits, individual exchanges, joint seminars and workshops, and other forms of activities as are mutually agreed upon".[139]

100. As indicated in the preceding paragraphs, instruments in the field of disaster response refer, broadly speaking, to scientific, technical and logistical cooperation. That includes the coordination of communication and sharing of information, the provision of personnel, response equipment and supplies, and the extension of scientific and technical expertise to strengthen the response capacity of the affected State. Owing to the nature of many of the requirements of disaster relief efforts, regulatory barriers to the entry of personnel and equipment and supplies pose a particular challenge, and are thus treated by a variety of international, regional and bilateral agreements. Additionally, a significant number of more recent agreements have focused on ex ante cooperation emphasizing disaster prevention and preparedness, including search and rescue arrangements, standby capacity

---

[138] United States-Mexico Treaty (see footnote 130 above).

[139] State Dept. No. 00-115, 2000 WL 1706748 (Treaty), United States of America-Korea, Memorandum of Understanding Concerning Cooperation in Science and Technology (2000).

requirements, early warning systems, exchange of information pertaining to risk identification, and contingency planning.

1. Communication and exchange of information

101. One aspect of cooperation that is frequently mentioned in disaster relief instruments is communication. The coordination of communication and exchange of information is essential to effective disaster response. Accordingly, many of the instruments that deal with disaster relief also touch upon the topic of information exchange.[140] For example, the preamble of the Tampere Convention notes "the vital role of broadcasting in disseminating accurate disaster information to at-risk populations",[141] and the Framework Convention of Civil Defence Assistance of 2000 requires the affected State to "provide all necessary information available relating to the situation, so as to ensure smooth implementation of assistance".[142] The Hyogo Framework for Action 2005-2015 also emphasizes the central role of information exchange, dialogue and cooperation in the context of disasters.[143]

102. The approach taken by various instruments with regard to communications varies, as some provisions refer generally to the desirability of effective disaster relief communications or a general obligation of the affected State to facilitate communications, while others contain more specific direction pertaining to the facilitation of disaster relief communications. For example, the International Law Association's model bilateral agreement provides that "in the zone of operations ... the organization shall have the right to communicate by radio, telegraph, or by any other means and to establish the necessary means for the maintenance of said communications in the interior of its facilities or between these facilities and its service units".[144] Likewise, the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines) state that "the Affected State should provide to the international disaster community timely and accurate information on

---

[140] See, e.g., Agreement between Denmark, Finland, Norway and Sweden on Cooperation Across State Frontiers to Prevent or Limit Damage to Persons or Property or to the Environment in the Case of Accidents, 1989, art. 6 (1). ("The Contracting States shall provide each other with information of importance for this agreement".) See also Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 1998, art. 4 (4). Hereinafter BSEC Agreement.

[141] Tampere Convention, also available from www.reliefweb.int/telecoms/tampere/index.html. See article 3, which calls for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards, health hazards and disasters", and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities".

[142] Framework Convention on Civil Defence Assistance, 22 May 2000, art. 4 (a) (1), 2172, United Nations, *Treaty Series*, vol. 2172, No. 38131. Hereinafter the Framework Convention.

[143] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

[144] Draft Model Agreement on International Medical and Humanitarian Law, art. 6. See also the Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies, 2001, art. 8 (2) ("the competent authorities of the requesting State shall undertake ... to facilitate the use by the aid units of existing telecommunication systems or the use of special frequencies, or both, or the establishment by the aid units of an emergency telecommunications system").

the nature and magnitude of the disaster, in order to enhance the effectiveness of external assistance".[145]

103. In the vein of substantive measures to facilitate communications, the CDERA Agreement provides, in article 11 (c), for the creation and maintenance of an emergency operations system to handle emergency telecommunications. The most comprehensive instrument in this area is the Tampere Convention, which provides a regulatory framework for cooperation with respect to the utilization of telecommunications and information technology in disasters.

2. Scientific and technical assistance

104. Another oft-mentioned modality of cooperation is the provision of scientific, technical or technological assistance and expertise. Different classes of disasters may call for specific technologies or expertise that are either not readily available in the affected country or that are not available in sufficient degree or quantity. Consequently, a number of instruments refer specifically to the provision of scientific and technical assistance, such as the ASEAN Agreement, which, in article 18 entitled "Technical Co-operation", calls for Parties to "promote the exchange of relevant information, expertise, technology, techniques and know-how".[146] The Framework Convention also refers, in article 2 (a), to cooperation with regard to the exchange of expertise. Moreover, a number of bilateral agreements provide for mutual assistance in scientific and technical matters as well.[147]

105. Technology can also enhance communication, as the utilization of telecommunications and information technology can substantially improve information exchange and increase the overall efficacy and efficiency of disaster relief efforts. The Tampere Convention deals with the provision of telecommunications assistance, including equipment, materials, information, training, radio-frequency spectrum, network or transmission capacity or other resources necessary to telecommunications. Another agreement that refers to a specific class of technological cooperation is the Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (also known as the International Charter on Space and Major Disasters), which relates to coordination of satellite technology in the disaster relief context.[148]

3. Relief personnel

106. Effective disaster relief also necessitates coordination with regard to the provision of emergency response personnel to strengthen the response capacity of the affected State, including medical teams, search and rescue teams, and technical

---

[145] Oslo Guidelines, as revised on 27 November 2006, para. 54; available from www.ifrc.org/idrl. Hereinafter Oslo Guidelines.

[146] Art. 18 (c). See paragraph 97 above. Also available from www.aseansec.org.

[147] See, for example, the Convention between the Kingdom of the Netherlands and the Kingdom of Belgium on Mutual Assistance in Combating Disasters and Accidents (1984), art. 13 (stating that the Parties should exchange all useful information of a scientific and technical nature), available from www.ifrc.org/docs/idrl/I94EN.pdf; see also the Protocol between the Kingdom of Spain and the Portuguese Republic on Technical Cooperation and Mutual Assistance in the Field of Civil Defense, 1992, art. 1 (2), and the Agreement between the Kingdom of Spain and the Argentine Republic on Cooperation on Disaster Preparedness and Prevention, and Mutual Assistance in the Event of Disasters (1988), art. IV.

[148] Available from www.disasterscharter.org.

specialists. A number of instruments call upon States to coordinate efforts and facilitate the expedited entry of relief personnel. These include General Assembly resolutions 46/182 of 1991[149] and 57/150 of 2002,[150] as well as the Measures to Expedite International Relief adopted by the International Conference of the Red Cross and Red Crescent Societies and the Economic and Social Council in 1977 and endorsed in by the General Assembly in resolution 32/56.[151]

107. In addition to the entry of personnel, instruments also deal with the coordination, facilitation and supervision of the provision of assistance within the affected State. Common issues are freedom of movement, transport of personnel, access to facilities, and coordination with the affected State, including the provision of support, relevant information, guidance, and translation and interpretation services. The General Assembly, in resolution 46/182, referred broadly to "facilitating" the work of relief teams. The Tampere Convention provides, in article 9, that "the States Parties shall, when possible, and in conformity with their national law, reduce or remove ... regulations restricting the movement of personnel who operate telecommunication equipment or who are essential to its effective use", and the Oslo Guidelines call, in paragraph 60, for "free access to disaster zones" for relief teams. The CDERA Agreement provides, in articles 16 and 22, for the cooperation of the affected State in making available local facilities and services and facilitating the in-country transit of relief personnel.

108. A number of instruments, including the Framework Convention, the Tampere Convention, the Inter-American Convention, and the Oslo Guidelines deal with the identification and protection of relief personnel.[152] The General Assembly, in paragraph 4 of its resolution 57/150, urged "all States to undertake measures to ensure the safety and security of international urban search and rescue teams operating in their territory".

4. Relief supplies and equipment

109. Disaster relief efforts also require a variety of goods and equipment. Victims of the disaster need food, clothing, medicine and other items to support their basic needs. Relief teams require equipment such as telephones, radios, computers, vehicles and construction equipment in order to operate effectively. While some goods and equipment necessary in the aftermath of a disaster may be found locally, there may be a need for the importation of items in the event of a shortage of goods and equipment in the affected State. Owing to the nature of disasters, the rapid attainment of relief supplies is critical. Moreover, many of those items — such as food and medicine — could spoil or expire if not transported and delivered in a timely manner. Cooperation in the area of provision and facilitation of entry of relief supplies and equipment is particularly crucial because many of the necessary items are highly regulated by domestic law. Those items include foods, medicines, machines, telecommunications equipment, vehicles and rescue dogs.

---

[149] General Assembly resolution 46/182, annex, paras. 27 and 28.

[150] General Assembly resolution 57/150, para. 3.

[151] See also the Inter-American Convention to Facilitate Disaster Assistance, 7 June 1991, art. VII, available from www.oas.org/juridico/english/treaties/a-54.html; hereinafter the Inter-American Convention; League of Arab States Decision No. 39 (Arab Cooperation Agreement on Regulating and Facilitating Relief Operations), art. 3, English translation available from www.ifrc.org/Docs/idrl/I644EN.pdf.

[152] See Tampere Convention, art. 5 (3); Inter-American Convention, arts. VII and XI.

110. As such, many agreements and guidelines deal with the facilitation of rapid access to disaster relief equipment and supplies. Some instruments specify those items and treat them in detail, while others make general provisions for "relief supplies and equipment", which encompass a variety of items. The General Assembly, in resolution 46/182, called generally for coordination to facilitate expeditious access to relief supplies, and suggested, in paragraph 30 of the annex to that resolution, that "disaster-prone countries should develop special emergency procedures to expedite the rapid procurement and deployment of equipment and relief supplies". The Measures to Expedite International Relief[153] also focus on coordination to avoid delay because of regulatory barriers.

111. Some instruments highlight equipment and supplies with specificity. The ASEAN Agreement, for example, mentions, in article 14 (a), telecommunications equipment and vehicles specifically. General Assembly resolution 46/182 and the International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention"), adopted in 1973 and amended in 1999, call on affected States to assist in the entry of medicines.[154] The Kyoto Convention also expressly refers to "specially trained animals" among the types of relief consignments that should be prioritized for expedited processing. Several bilateral agreements, such as the Agreement between Sweden and Norway concerning the Improvement of Rescue Services in Frontier Areas of 1974 and the Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies of 2001, also deal with the entry process for specially trained rescue dogs.

112. Agreements also provide for the re-export of goods to ensure that relief supplies and equipment can be efficiently redirected to where they are most needed. The ASEAN Agreement calls, in article 14 (b), for the facilitation of "the entry into, stay in, *and departure from* its territory of personnel and of equipment, facilities, and materials involved or used in the assistance" [emphasis added]. Similarly, the Tampere Convention, in article 9, calls for reduction of "regulations restricting the transit of telecommunication resources into, out of, and through the territory of a State party".

113. Cooperation involves both accommodation by the affected State to expedite and facilitate the provision of relief assistance and coordination and planning by assisting actors to reduce the complications of providing relief. If assisting actors are informed of and prepare adequately for the requirements of the affected State, the process can be made more efficient. The Measures to Expedite International Relief call on "donors to restrict their relief contributions to those high-priority relief needs identified by appropriate relief authorities and agencies". Many instruments provide for a degree of specificity to the requests of affected States, and for assisting actors to comply with those requests. The Inter-American Convention, for example, states in article II (b) that "upon the occurrence of a disaster the

---

[153] Resolution 6 adopted at the 23rd International Conference of the Red Cross and Red Crescent, in *Handbook of the International Red Cross and Red Crescent Movement* (third edition, 1994), pp. 811-815, recommendation D.

[154] International Convention on the Simplification and Harmonization of Customs Procedures (hereinafter "Kyoto Convention"), of 18 May 1973, United Nations, *Treaty Series*, vol. 950, No. 13561, p. 269, as amended by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures, of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, No. 13561, p. 27.

assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster". Communication as to the requirements, capacities and expectations of concerned parties can facilitate the relief process significantly and reduce the difficulty caused by regulation.

5. Cooperation in disaster preparedness, prevention and mitigation

114. More recent conventions have shifted the focus from a primarily response-centric model to one focused largely on prevention and preparedness. Many instruments deal with not only cooperation as it pertains to relief assistance, but also the prevention and mitigation of disasters: search and rescue arrangements, standby capacity requirements, early warning systems, exchange of information pertaining to risk assessment and identification, contingency planning and capacity-building.

115. The Hyogo Framework for Action puts a large degree of emphasis on prevention and preparedness, stating that one of the agreement's primary objectives is "to share good practices and lessons learned to further disaster reduction within the context of attaining sustainable development, and to identify gaps and challenges".[155] The General Assembly, in paragraphs 5, 13 and 14 of the annex to resolution 46/182, called for cooperation in sharing scientific and technical information related to the assessment, prevention, mitigation and early warning of disasters as well as assistance to developing States to bolster their capacity in disaster prevention and mitigation, while in paragraph 7 of resolution 57/150 the Assembly more generally encouraged "the strengthening of cooperation among States at the regional and subregional levels in the field of disaster preparedness and response, with particular respect to capacity-building at all levels".[156] Other instruments call for cooperation in regard to the training of experts, research, and studies to increase preparedness, such as the ASEAN Agreement, which states in article 19 that "the Parties shall individually or jointly, including in cooperation with appropriate international organizations, promote and, whenever possible, support scientific and technical research programmes related to the causes and consequences of disasters and the means, methods, techniques and equipment for disaster risk reduction".

116. In the light of all of the above, the Special Rapporteur concludes that the inclusion is warranted in the set of draft articles on Protection of Persons in the Event of Disasters of an additional draft article concerning the elaboration of the Duty to Cooperate. That additional draft article, whose number and placing in the set is to be decided at a later stage, can most economically and usefully be modelled on article 17, paragraph 4, of the draft articles on the Law of Transboundary Aquifers, quoted earlier (see para. 85 above). The proposed additional draft article would thus read as follows:

---

[155] *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters* (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

[156] See also the Southern African Development Community Protocol on Health, art. 25 (b) (calling for Parties to "collaborate and facilitate regional efforts in developing awareness, risk reduction, preparedness and management plans for natural and man-made disasters"), 1999, available from www.sadc.int.

Draft article A
Elaboration of the duty to cooperate

States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance.

V. Conditions for the provision of assistance

117. The Commission has established in draft article 9 that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and to ensure the provision of humanitarian assistance on its territory. It also has the primary role to direct, control, coordinate and supervise such assistance within its territory. The Special Rapporteur will now consider the conditions that an affected State may place on the provision of assistance.

118. In determining the extent of appropriate conditions, it is necessary to reiterate the core principles of State sovereignty and non-intervention. The Special Rapporteur, in his third report (A/CN.4/629, para. 75), noted that "[t]he correlating principles of sovereignty and non-intervention presuppose a given domestic sphere, or a *domaine réservé*, over which a State may exercise its exclusive authority". In formulating his proposal for draft article 9, the Special Rapporteur took particular note of the principles of State sovereignty and non-intervention, concluding that "it is clear that a State affected by a disaster has the freedom to adopt whatever measures it sees fit to ensure the protection of the persons found within its territory" (ibid., para. 74). As such, the affected State may impose conditions on the provision of assistance, including compliance with its national laws and fulfilling demonstrated needs.

119. The core principles of State sovereignty and non-intervention should be considered in the light of the responsibilities undertaken by States, in the exercise of their sovereignty, to other States and to individuals within a State's territory and control. As recognized in the Judgment in the *Corfu Channel* case, "[s]overeignty confers rights upon States and imposes obligations on them".[157] According to the commentary, draft article 9 reflects those obligations and "affirms the primary role held by an affected State in the response to a disaster upon its territory".[157] Therefore, any condition imposed by the affected State must be reasonable and must not undermine the duty to ensure protection of persons on its territory. Furthermore, the affected State has a corresponding duty to facilitate the prompt and effective delivery of assistance, which includes the waiver of national laws as appropriate.

A. Compliance with national laws

120. An affected State may condition the provision of assistance on compliance with its national law. A requirement of compliance with national law follows

---

[157] *Corfu Channel* case (*United Kingdom of Great Britain and Northern Ireland v. Albania*), *Judgment* of 9 April 1949, *I.C.J. Reports 1949*; Separate Opinion by Judge Álvarez, p. 43. See A/66/10, para. 289, commentary to art. 9, para. (2).

naturally from the principles stated in draft article 9, by virtue of its sovereignty: the duty to ensure the protection of persons and to ensure the provision of humanitarian assistance lies with the affected State, and it has the primary role in the direction, control, coordination and supervision of such assistance. Moreover, this principle is grounded in State practice.

121. There are several multilateral treaties which include a provision requiring compliance with national law. The Tampere Convention states, in article 4 (8): "Nothing in this Convention shall interfere with the right of a State Party, *under its national law*, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory" (emphasis added).

122. The ASEAN Agreement provides (art. 13 (2)) that "[m]embers of the assistance operation shall respect and abide by all national laws and regulations". Several other international agreements also require assisting actors to respect national laws[158] or to act in accordance with the law of the affected State.[159]

123. The General Assembly also declared, in paragraph 5 of the annex to resolution 46/182, that "cooperation [to address emergency situations] should be provided in accordance with international law *and national laws*" (emphasis added). This is a clear statement that the affected State should be able to condition the provision of assistance on compliance with its national law.

124. Several non-binding and draft provisions on disaster assistance include a requirement that assisting actors respect, abide by or observe the affected State's national law.[160] Those international law instruments acknowledge the principle that assisting actors should comply with an affected State's national law.

125. Conditioning the provision of assistance on compliance with national law creates obligations on the assisting actors. Furthermore, as an exception to the rule that the State may condition the provision of assistance on compliance with national law, the affected State must facilitate prompt and effective assistance.

1. Obligation of assisting actors to cooperate in compliance with national laws

126. In deference to the right of the affected State to condition the provision of assistance on compliance with national law, there is a corresponding obligation on assisting actors to provide assistance in compliance with the national law and

---

[158] See, for example, the Inter-American Convention, art. VIII, XI (d); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, art. 8 (7).

[159] Ibid.; Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, of 15 April 1998, arts. 5 and 9, hereinafter BSEC Agreement.

[160] See, for example, International Federation of the Red Cross, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, November 2007, adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, document 30IC/07/R4, annex, art. 4 (1), hereinafter IFRC Guidelines; Peter MacAlister-Smith, Draft International Guidelines for Humanitarian Assistance Operations (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), arts. 9 (b) and 22 (d), hereinafter Max Planck Guidelines; and Council of Europe, recommendation Rec(2002)3, of the Committee of Ministers to member States on transfrontier cooperation in civil protection and mutual assistance in the event of natural and technological disasters occurring in frontier areas, adopted by the Committee of Ministers at the 786th meeting of the Ministers' Deputies, 6 March 2002, appendix, para. 9.

authorities of the affected State. The obligation to respect the national law and authorities of the affected State arise out of respect for the sovereignty of the affected State and the principle of cooperation, reaffirmed in draft article 5.

127. Three obligations on assisting actors flow from the general principle that assistance be provided in compliance with the national laws and authorities of the affected State. First, there is an obligation on members of the relief operation to observe the national laws and standards of the affected State. Second, there is an obligation of the head of the relief operation to ensure the observance of the national laws and standards of the affected State. Finally, there is the obligation to cooperate with national authorities.[161]

128. First, there is an obligation on personnel of the relief operation to observe the national laws and standards of the affected State. An articulation of this general principle is found in the Convention on the Transboundary Effects of Industrial Accidents: "The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party."[162] The Inter-American Convention states, in article XI (d), that "[a]ssistance personnel have the obligation to respect the laws and regulations of the assisted State and of States they may cross en route. Assistance personnel shall abstain from political or other activities that are inconsistent with said laws or with the terms of this Convention". Similarly, the BSEC Agreement states: "[t]he members of the assistance team are obliged to observe the State laws and rules of the Requesting Party".[163]

129. Second, the head of the relief operation of the assisting State, international organization or other humanitarian actor has a duty to ensure the observance of the national laws and standards of the affected State. This duty was articulated in article 13 (2) of the ASEAN Agreement: "The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations". This obligation flows naturally from the general understanding that the head of the relief operation is generally responsible for the "immediate operational supervision of the personnel".[164]

130. Third, in order to comply with national laws and pursuant to obligations to cooperate under draft article 5, the assisting State has an obligation to cooperate with national authorities. The Max Planck Guidelines provide, in paragraph 22 (b), that "[a]t all times during humanitarian assistance operations the assisting personnel shall … [c]ooperate with the designated competent authority of the receiving State". Similarly, the IFRC Guidelines state, in article 4 (1), that "assisting actors and their personnel should … coordinate with domestic authorities". The United Nations Institute for Training and Research (UNITAR) Model Rules for Disaster Relief Operations (1982) have elaborated on the purpose of such an obligation: "Relief

---

[161] See ASEAN Agreement, art. 13 (2) ("Members of the assistance operation shall respect and abide by all national law and regulations. The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations. The receiving Party shall cooperate to ensure that members of the assistance operation observe national laws and regulations.").

[162] Convention on the Transboundary Effects of Industrial Accidents, of 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605, annex X (1).

[163] BSEC Agreement, art. 9 (3). See also IFRC Guidelines, art. 4 (1); and Max Planck Guidelines, para. 22 (d).

[164] Transboundary Effects Convention, annex X (1).

personnel shall cooperate at all times with the appropriate authorities of the receiving State to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the facilities granted".[165]

2. Exception for the affected State to facilitate prompt and effective assistance

131. As articulated in draft article 9, the affected State has the duty to ensure the protection of persons on its territory. As such, the right to condition the provision of assistance on compliance with national law is not absolute. The exception to this rule is that the affected State has a duty to facilitate the provision of prompt and effective assistance, under its sovereign obligations to its population. States have an obligation to assist in compliance with national law and an obligation to examine whether certain national laws must be waived in the event of a disaster.

132. First, States have an obligation to assist in compliance with national law. The obligation to ensure prompt and effective assistance includes an obligation to provide relevant information to assisting actors. Article 3 (1) of the BSEC Agreement provides that "[t]he Parties shall cooperate … in order to provide prompt relevant information and assistance in case of natural or man-made disasters".[166] This duty extends to an obligation of the affected State to cooperate to ensure the observance of national law, as illustrated by article 13 (2) of the ASEAN Agreement: "[t]he receiving Party shall cooperate to ensure the members of the assistance operation observe national laws and regulations".[167]

133. As part of the duty to cooperate to ensure the observance of national law, the affected State has an obligation to provide assisting actors with relevant laws, including those relating to privileges and immunities and regulatory barriers. This obligation extends only to laws that are relevant in the disaster context. As stated in article 10 (3) of the IFRC Guidelines, "[a]ffected States should make available to assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief or initial recovery assistance".

134. Second, in certain circumstances, an affected State may be required to waive provisions of its law in order to facilitate the prompt and effective provision of assistance in order to fulfil its duty to ensure the protection of persons on its territory. As noted in the Memorandum by the Secretariat (A/CN.4/590, para. 70), "national laws are, generally speaking, not well suited for the purpose of creating a 'humanitarian space' in the wake of a disaster since compliance can prove onerous and costly in terms of both resources and time lost". A waiver of national law by the affected State of its national laws should promote access to and the timeliness of the delivery of assistance (ibid., paras. 105 and 106).

135. International instruments currently recognize several instances when national laws must be waived in order to facilitate prompt and effective assistance: privileges and immunities, visa and entry requirements, customs requirements and tariffs, and

---

[165] United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (Sales No. E.82.XV.PE/8), annex A, rule 14. Hereinafter UNITAR Model Rules. See also Oslo Guidelines, version of 27 November 2006, para. 48.

[166] See also Max Planck Guidelines, art. 19 (c).

[167] See footnote 161 above.

quality and freedom of movement. Waiver of national law in each of these fields should not be required in every circumstance, but rather should be reasonable when balancing the affected State's duty to provide assistance and its obligation to protect its population from harm in the light of the particular circumstances.

136. The first instance when national laws must be amended or waived concerns the privileges and immunities of actors participating in disaster relief operations. The 1986 Nuclear Accident Convention requires (art. 8 (2) (a)) an affected State requesting assistance to provide certain privileges and immunities to assisting actors, including immunity from arrest, detention and legal process. An agreement between Austria and the Federal Republic of Germany also requires the affected State to extend "protection" to the emergency teams of assisting States.[168] The Framework Convention on Civil Defence Assistance also states, in article 4 (5): "The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance".

137. The second instance when national laws must be amended or waived concerns visa and entry requirements. The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams",[169] thus delaying the vital assistance the affected State has a duty to provide. The ASEAN Agreement, in article 14 (b), requires an affected State to "facilitate the entry into, stay in and departure from its territory of personnel and of equipment, facilities and materials involved or used in the assistance". The Nuclear Accident Convention includes a similar provision (art. 8 (5)). Specific bilateral agreements have also allowed entry to assisting actors without obtaining entry permits in the event of a disaster.[170] In addition to those waivers of entry requirements, the Tampere Convention, in articles 9 (1) and 9 (3) (d), also requires affected States to remove regulatory barriers, including recognizing foreign operating licences in the field of telecommunications. There are also numerous international agreements requiring

---

[168] Agreement between the Republic of Austria and the Federal Republic of Germany concerning mutual assistance in the event of disasters or serious accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 9 (3).

[169] Resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October-1 November 1975.

[170] See, for example, the Convention on Mutual Assistance in Fighting Catastrophes and Accidents, Belgium-Netherlands, of 14 November 1984, United Nations, *Treaty Series*, vol. 1526, No. 26466, art. 6 (2) and (3). See also the Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa regarding the Coordination of Search and Rescue Services, of 10 May 2002, art. 2 (2); Agreement between the Republic of Austria and the Federal Republic of Germany concerning Mutual Assistance in the Event of Disasters or Serious Accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 6; Convention on Mutual Assistance in the Event of Disasters or Serious Accidents, of 3 February 1977, France-Germany, United Nations, *Treaty Series*, vol. 1214, No. 19561, art. 4; Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 9; Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia regarding the Coordination of Search and Rescue Services, of 8 September 2000, art. 7; Agreement on Cooperation for Natural Disasters Prevention and Rehabilitation, of 10 April 1987, Guatemala-Mexico, United Nations, *Treaty Series*, vol. 1509, No. 26055, art. V.

unencumbered passage through transit States regardless of entry or visa requirements.[171]

138. Some agreements, such as the Inter-American Convention, the Tampere Convention and the ASEAN Agreement, do not require a waiver of entry and visa requirements, but simply require States to use their existing national laws to allow entry.[172] However, the better requirement may be to recognize that a waiver is required in order to promote the prompt and effective provision of assistance in the event of a natural disaster because of the concerns noted by the League of Red Cross Societies.

139. The third instance in which national law may be amended or waived concerns an affected State's, and even transit States', customs requirements and tariffs on assistance in the event of a natural disaster. That requirement reduces costs and delays with respect to transit States in the event of a natural disaster, promoting prompt and effective assistance.[173] Some international instruments require facilitation of entry of goods and equipment relating to disaster relief. Other instruments additionally require that such goods and equipment not be taxed.

140. With respect to facilitating the clearance of customs, Specific Annex J, Chapter 5, article 2 of the Kyoto Convention requires that "clearance of relief consignments for export, transit, temporary admission and import be carried out as a matter of priority".[174] The Tampere Convention and the ASEAN Agreement contain similar provisions.[175] In addition, bilateral treaties[176] and General Assembly resolution 57/150 of 27 February 2003 urge affected States to reduce formalities in order to facilitate entry of goods and equipment. With respect to waiving tariffs, duties or import taxes, the Inter-American Convention also includes a provision (art. V) waiving "taxes, fees, and other charges" for vehicles, equipment and supplies. The ASEAN Agreement and the BSEC Agreement contain similar provisions.[177]

141. The fourth instance when national laws must be amended or waived concerns national laws and regulations related to quality of goods and equipment imported for disaster relief. As noted in the Memorandum by the Secretariat, waiver of laws related to quality is for the purpose of "ensur[ing] that existing laws and regulations in place to assure quality in various settings do not have the effect of limiting

---

[171] See, for example, Nuclear Accident Convention, art. 9; ASEAN Agreement, art. 16 (1); Oslo Guidelines, para. 63; CDERA Agreement, art. 22.

[172] See Inter-American Convention, art. VII (a); Tampere Convention, art. 9 (4); ASEAN Agreement, art. 14 (b).

[173] Convention on Temporary Admission ("Istanbul Convention"), of 26 June 1990, United Nations, *Treaty Series*, vol. 1762, No. 30667, art. 2.

[174] Kyoto Convention, Specific Annex J (5), art. 2.

[175] Tampere Convention, art. 9 (4); ASEAN Agreement, art. 14 (b). See also the 1976 ASEAN Declaration, para. III (b).

[176] See, for example, the Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 9; and the Convention on Mutual Assistance between French and Spanish Fire and Emergency Services, of 14 July 1959, updated by the Protocol of 8 February 1973, United Nations, *Treaty Series*, vol. 951, No. 13576, art. II.

[177] ASEAN Agreement, art. 14 (a); Agreement on Cooperation Across State Frontiers to Prevent or Limit Damage to Persons or Property or to the Environment in the Case of Accidents, of 20 January 1989, United Nations, *Treaty Series*, vol. 1777, No. 31001, art. 3 (3); BSEC Agreement, art. 10. See also Oslo Guidelines, art. 60.

effective disaster relief operations" (A/CN.4/590, para. 201). Some agreements exempt goods imported for the purpose of disaster relief from any national regulation entirely.[178] The Agreement between the Republic of Austria and the Federal Republic of Germany Concerning Mutual Assistance in the Event of Disasters or Serious Accidents of 23 December 1988,[179] the International Red Cross and Red Crescent Movement[180] and the UNITAR Model Rules (annex A, rule 7) suggest that affected States may have to waive import restrictions, such as for certain medical products. Some instruments require waiver for rescue animals and food restrictions.[181]

142. The final instance when national laws may be waived in the event of a natural disaster concern freedom of movement. Some international law instruments only require a State to remove internal obstacles to assisting actors entering the disaster area. The UNITAR Model Rules provide that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions".[182] The 2003 resolution on humanitarian assistance adopted by the Institute of International Law includes a similar provision.[183]

143. Although some national laws encourage opening disaster areas to assisting actors,[184] other States continue to place restrictions on assisting actors in their national laws or regulations. Japanese law allows local officials to prohibit the entry of non-emergency personnel in the event of danger to personnel.[185] The law of Nepal includes a provision allowing the Government to require assisting actors to receive permission before entering a disaster area.[186]

144. Some international instruments suggest that the affected State may have an obligation to facilitate entry into the disaster area. The General Assembly, in resolution 46/182 (annex, para. 35 (d)), required the United Nations Emergency Relief Coordinator to facilitate "the access by the operational organizations to emergency areas for the rapid provision of emergency assistance by obtaining the consent of all parties concerned". A small number of bilateral agreements require that the affected State permit and facilitate access to a disaster area, and even provide transportation to assisting actors.[187]

---

[178] See, for example, the Agreement on Mutual Assistance in the Event of Disasters or Serious Accidents (with exchange of notes), Denmark-Federal Republic of Germany, of 16 May 1985, United Nations, *Treaty Series*, vol. 1523, No. 26375, art. 5 (5); IFRC Guidelines, art. 17 (1) (b).

[179] United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 7 (5).

[180] Measures to Expedite International Relief. See footnote 153 above.

[181] See, for example, Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies, of 6 December 2001, art. 8 (2); Measures to Expedite International Relief, recommendation D; UNITAR Model Rules, annex A, rule 7.

[182] Ibid., annex A, rule 16.

[183] Institute of International Law, Bruges session, 2 September 2003, sect. VII, para. 3.

[184] Order No. 48/1999 (XII.15) of the Minister of the Interior on the disaster protection tasks of organs subordinated to the Minister of the Interior (Hungary), sect. 15 (3) (c) and (d); Law on Disaster Protection (Mongolia), art. 30 (2).

[185] Disaster Countermeasures Basic Act, June 1997 (Japan), art. 63.

[186] An Act to Provide for the Relief Work relating to the Natural Calamity, 1982 (Nepal), para. 4 a.

[187] See, for example, Agreement concerning the United States relief assistance to the Chinese people (with exchange of notes), of 27 October 1947, China-United States of America, United Nations, *Treaty Series*, vol. 12, No. 178, art. V (a) and (b).

145. Although it is reasonable for the national laws described above to be waived in some circumstances, an absolute requirement that those laws be waived in every circumstance would prevent a State from exercising its sovereignty to protect its population and persons within its territory and control. For example, an absolute requirement of waiver of quality regulations might interfere with an affected State's duty to protect its population from goods that the State in good faith believes to be harmful. The balance between the need to facilitate timely assistance while also preserving minimum standards concerning the quality of assistance is reflected in the Max Planck Guidelines, which urge States to "waive any prohibitions, restrictions or regulations which would otherwise delay the importation of humanitarian assistance consignments, *to the extent compatible with reasonable health and safety standards*".[188] Therefore, rather than a strict and absolute requirement of waivers in a natural disaster, the affected State should consider the reasonableness of the waiver under the circumstances and balancing its obligations to provide prompt and effective assistance and to protect its population.

B. Identifiable needs and quality control

146. Affected States may condition the provision of assistance on the identifiable needs of the persons concerned and the quality of assistance, in furtherance of the purpose of the present draft articles "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned" (A/66/10, para. 288, art. 2). The Commission has emphasized the discretionary power of the affected State to choose the assistance "most appropriate to its specific needs" in the commentary to draft article 10.[189] In exercising this discretionary power and in accordance with the principle that the affected State's Government is "best placed to determine the gravity of an emergency situation and to frame appropriate response policies",[190] the affected State should undertake a needs assessment. The affected State may impose quality conditions for the provision of assistance to ensure that its identified needs are effectively met. In reference to draft article 2 explaining the purpose of the present draft articles, "the link between a high-quality ('adequate and effective') response and meeting the needs of the persons concerned" was underlined in the Commission.[191] The affected State should facilitate the provision of high-quality, effective assistance by specifying the scope and type of assistance requested, in line with its duty to cooperate under draft article 5 (A/66/10, para. 288, art. 5).

1. Identifiable needs

147. The affected State's right to condition the provision of assistance on identifiable needs enables the State to ensure the protection of persons on its territory. Thus, the ability to condition the provision of assistance on identifiable

---

[188] Max Planck Guidelines, para. 21 (b) [emphasis added].

[189] A/66/10, para. 288, art. 10, para. (10). ("The phrase 'as appropriate' was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations, and relevant non-governmental organizations the assistance that is most appropriate to its specific needs.").

[190] Ibid., art. 9, para. (4). ("The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies.").

[191] Statement by the Chairman of the Drafting Committee, 2009 (A/CN.4/SR.3029), p. 5.

needs allows fulfilment of draft article 9, which recognizes the affected State's primary role in directing, controlling and coordinating disaster relief on its territory. The State's ability to condition assistance on identifiable needs is also fully consistent with the principles of humanity, neutrality and impartiality identified in draft article 6 and the duty to cooperate recognized in draft article 5.

148. According to the Secretariat's Memorandum, conditioning disaster relief assistance on identifiable needs is a valid constraint on the provision of such assistance.[192] Multilateral instruments regulating the provision of relief assistance emphasize the importance of allocating assistance directly in proportion to needs.[193] Article 72 of the Cotonou Agreement, for example, establishes a general requirement that humanitarian and emergency assistance be granted "exclusively according to the needs and interests of victims of disasters". Similarly, the General Assembly, in paragraph 2 of resolution 54/233, provided that humanitarian assistance for natural disasters "should be determined on the basis of the human dimension and needs arising out of the particular natural disaster". In the particular context of food supplies, the Food Aid Convention submits (art. III (j)) that food aid should be "consistent with the dietary habits and nutritional needs of recipients".

149. A number of model rules and draft guidelines reiterate the emphasis on allocation of assistance in proportion to needs.[194] In explaining the rationale for inclusion of the phrase "as appropriate" in draft article 10 on the duty of the affected State to seek assistance, the Commission notes that it sought to emphasize the discretion of an affected State to choose "assistance that is most appropriate to its specific needs" from among different assisting entities.[195] Under the IFRC Guidelines, assisting actors should calculate aid priorities "on the basis of need alone",[196] disaster relief should be "[a]dequate for the needs of affected persons"[197] and assisting States and organizations should inspect all goods and equipment to ensure "appropriateness for the needs in the affected State".[198] The UNITAR Model Rules (annex A, rule 2 (2)) require that the assisting State consult with the affected State "with respect to the needs of the receiving State". The Mohonk Criteria state that assistance should be allocated in proportion to needs.[199] The Max Planck Guidelines likewise stipulate that humanitarian assistance should be "suitable for meeting the assessed needs in every respect".[200]

---

[192] A/CN.4/590, para. 76.

[193] Partnership Agreement between the members of the African, Caribbean and Pacific groups of States on the one part, and the European Community and its member States, on the other part, signed in Cotonou, Benin, on 23 June 2000, *Official Journal of the European Communities*, vol. 43, No. L-317 (15 December 2000), p. 3, art. 72; Food Aid Convention, of 13 April 1999, United Nations, *Treaty Series*, vol. 2073, No. 32022, art. VIII (a). Hereinafter Food Aid Convention; General Assembly resolution 54/233 of 22 December 1999, para. 2.

[194] A/66/10, para. 10. See also IFRC Guidelines, arts. 4 (2), 4 (3) and 17 (3); UNITAR Model Rules, annex A, rule 2 (2); "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance", reprinted in *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192-198, art. 15. Hereinafter Mohonk Criteria.

[195] A/66/10, para. 288, art. 10, commentary, para. (10).

[196] IFRC Guidelines, art. 4 (2).

[197] Art. 4 (3).

[198] Ibid., art. 17 (3).

[199] Mohonk Criteria, sect. III.2 (a).

[200] Max Planck Guidelines, art. 15.

150. Although numerous texts support the principle of needs-based allocation of disaster relief assistance, other factors have been mentioned in the Sixth Committee which might validly influence the distribution of relief assistance, including economic considerations relating to the capability to provide assistance and the importance of assessing proportionality of needs on a case-by-case basis (A/65/10, para. 312). In addition, it has been noted that the General Assembly, in paragraph 2 of resolution 54/233, envisioned consideration of the "human dimension", implying that allocation of humanitarian assistance is not limited to a strict proportional provisioning of resources based on need.

2. Needs assessment

151. An affected State that conditions the provision of assistance on its linkage to identifiable needs must clearly identify such needs. It has been noted that an affected State may undertake a needs assessment on its own or jointly in cooperation with an assisting State (A/CN.4/590, para. 80). Cooperation between States in undertaking needs assessments reflects the duty to cooperate enshrined in draft article 5, A/66/10, para. 288, art. 5. The ASEAN Agreement, in article 11 (3), provides that the affected State shall either specify the assistance required to the assisting entity or, if this is not practicable, assess and decide upon the assistance required, jointly and in consultation with the assisting entity. The Food Aid Convention, in article VIII (b), also foresees an "evaluation of needs by the recipient and the members, within their own respective policies", in order to determine the provision of food aid. That instrument further provides, in article VIII (g), that States parties should seek to develop a "common approach to needs analysis" by consulting with each other at the regional and recipient State level when food aid needs are identified. Likewise, the process described by the UNITAR Model Rules (annex A, rule 2 (2)) involves the assisting State consulting with the designated national authority of the receiving State.

152. A role is also envisioned for humanitarian agencies in needs assessments. The Economic and Social Council, in paragraph 8 of resolution 2002/32, encouraged humanitarian agencies to strengthen humanitarian information centres by "providing timely and accurate information on assessed needs, and the activities developed to respond to them". Accordingly, the International Recovery Platform conducts Post-Disaster Needs Assessments, which harmonize the assessment, analysis and prioritization of needs by various stakeholders.[201] The Balkan National Societies' Recommended Rules and Practices suggest that States "ascertain the needs of the victims for humanitarian assistance and their number" alongside "competent international relief agencies which offer their assistance".[202] Along these lines, since 1991, the United Nations Office for the Coordination of Humanitarian Affairs has facilitated the implementation of Common Humanitarian Action Plans based on needs assessments and other strategic planning.[203]

---

[201] International Recovery Platform, Post-Disaster Needs Assessment, available from www.recoveryplatform.org/pdna.

[202] Recommended Rules and Practices, Balkan National Societies meeting on international disaster response law, Belgrade, 24-26 September 2004, sect. II (2).

[203] Office for the Coordination of Humanitarian Affairs, Consolidated Appeal Process, available from http://unocha.org/cap/.

153. It should be noted that a needs assessment is not limited to the context where the affected State has conditioned provision of assistance on linkage to identified needs. It has been stated that a needs assessment is appropriate where an instrument requires the affected State to specify the scope and type of assistance requested (A/CN.4/590, para. 80). In such a case, the needs assessment forms the basis of the information provided regarding the scope and type of assistance (ibid.).

3. Quality control

154. International instruments provide that the affected State may condition aid on quality including, inter alia, safety,[204] nutrition and cultural appropriateness, encouraging members of the public to assist States in providing only those relief goods requested by the affected State and discouraging the provision of unnecessary or inappropriate goods.[205] The ASEAN Agreement, for example, provides in article 12 (4), that "[t]he relief goods and materials provided by the Assisting Entity should meet the quality and validity requirement of the Parties concerned for consumption and utilization". Article III (j) of the Food Aid Convention declares that "[a]ll products provided as food aid shall meet international quality standards, be consistent with the dietary habits and nutritional needs of recipients and, with the exception of seeds, shall be suitable for human consumption".

155. The Secretariat's Memorandum has explained that "certain provisions aim to assure that disaster relief assistance is of a sufficiently high quality as to provide a benefit, rather than a potential harm, to recipients. Under this general concept of quality, many different provisions exist, including those seeking to assure that disaster relief is geographically and culturally relevant, that it is timely, and that it is coordinated so as to assure non-redundancy of assistance" (A/CN.4/590, para. 194).

156. The ability of an affected State to condition the provision of aid on quality is not limited to the quality of the goods themselves, but also applies to the quality of assistance workers deployed in the affected State. The General Assembly, in resolution 57/150, urged States to deploy search and rescue teams that complied with internationally developed standards including training, equipment and cultural awareness.[206] The IFRC Guidelines expand on the notion of quality conditions to

---

[204] IFRC Guidelines, art. 18 (3) ("Assisting States and eligible assisting humanitarian organizations should take all reasonable steps to ensure the quality, appropriateness and safety of any such medications and equipment. …").

[205] Ibid., art. 5 (2) ("All States should actively encourage members of the public interested in contributing to international disaster relief or initial recovery to make financial donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State.").

[206] General Assembly resolution 57/150 of 16 December 2002, para. 5 ("*Further urges* all States that have the capacity to provide international urban search and rescue assistance to take the necessary measures to ensure that international urban search and rescue teams under their responsibility are deployed and operate in accordance with internationally developed standards as specified in the Guidelines of the International Search and Rescue Advisory Group, particularly concerning timely deployment, self-sufficiency, training, operating procedures and equipment, and cultural awareness.").

include quality of coordination efforts, consistent with draft article 5, and quality of personnel.[207]

4. Scope and type

157. As a corollary to draft articles 5 and 9, the affected State should specify the scope and type of assistance it is seeking if the provision of assistance is conditioned on quality. As has been previously explained, "certain bilateral treaties contain a provision to the effect that 'the Party requesting assistance must specify the nature and scope of the assistance which it requires and must, to the extent possible, provide the other Party with the information which the other Party needs in order to determine the scope of the assistance'" (A/CN.4/590, para. 199). Providing assisting States with relevant information specifying the type and scope of the conditions on quality both helps to facilitate the affected State's duty to protect its citizens and take the lead in relief efforts under draft article 9 and also to cooperate with assisting States, as provided by draft article 5.

158. In upholding the duty to protect victims of natural disasters and the duty to cooperate with assisting States, when requesting assistance the affected State shall specify the scope and type of assistance it is requesting. The Tampere Convention provides that "[a] State Party requesting telecommunication assistance shall specify the scope and type of assistance required".[208] The ASEAN Agreement (art. 11 (3)) requires the affected State to "specify the scope and type of assistance required and, where practicable, provide the Assisting Entity with such information as may be necessary for that Party to determine the extent to which it is able to meet the request". As noted previously in the discussion relating to needs assessment, the ASEAN Agreement also acknowledges, consistent with draft article 9, that in many instances the affected State may not be capable of specifying scope and type of assistance required and in such instance, assisting States shall collaborate in the needs assessment as it relates to quality.[209]

---

[207] IFRC Guidelines, art. 4 (3) ("To the greatest extent practicable, their disaster relief and initial recovery assistance should also be: … (b) Adequate for the needs of affected persons and consistent with any applicable international standards of quality; (c) Coordinated with other relevant domestic and assisting actors; (d) Provided and conducted in a manner that is sensitive to cultural, social and religious customs and traditions … (f) Provided by competent and adequately trained personnel.").

[208] Tampere Convention, article 4 (2). This also reiterates the IFRC Guidelines, art. 1 (3) ("While affirming the principal role of domestic authorities and actors, they recommend minimum legal facilities to be provided to assisting States and to assisting humanitarian organizations that are willing and able to comply with minimum standards of coordination, quality and accountability.").

[209] ASEAN Agreement, art. 11 (3) ("In the event that it is not practicable for the Requesting Party to specify the scope and type of assistance required, the Requesting Party and Assisting Entity shall, in consultation, jointly assess and decide upon the scope and type of assistance required."). See also Nuclear Accident Convention, art. 2 (2) (reiterating that "[a] State Party requesting assistance shall specify the scope and type of assistance required and, where practicable, provide the assisting party with such information as may be necessary for that party to determine the extent to which it is able to meet the request. In the event that it is not practicable for the requesting State Party to specify the scope and type of assistance required, the requesting State Party and the assisting party shall, in consultation, decide upon the scope and type of assistance required").

159. Other international instruments place the onus of consultation and coordination on the assisting, rather than the affected, State. The Inter-American Convention provides that "[u]pon the occurrence of a disaster the assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster".[210] Bilateral treaties also acknowledge, as explained above in section V.B.2 — concerning the discussion of linking aid to needs on a case-by-case rather than directly proportional basis — that a case-by-base analysis that does not include operational detail may also be appropriate.[211]

160. The IFRC Guidelines place a reciprocal duty on both assisting States and affected State to specify the scope, type and needs of assistance that are available and offered or needed and sought. Article 10 (2) of the IFRC Guidelines declares that "[r]equests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected States may also wish to indicate particular types of goods and services likely to be offered that are not needed". This reciprocal duty is most consistent with the importance of cooperation among States underlying draft article 5 and with the reality that the victims of natural disasters in the affected State may benefit from quality specification coming from assisting States, thus further enabling the affected State to fulfil its duty under draft article 9.

---

[210] Inter-American Convention to Facilitate Disaster Assistance, art. II (b). This is in contrast to the Transboundary Effects Convention, art. 12 (1), for example, which places the onus of specifying the scope and type of aid on the affected State: "If a Party needs assistance in the event of an industrial accident, it may ask for assistance from other Parties, indicating the scope and type of assistance required". See also BSEC Agreement, art. 4 (2) ("The Assistance shall be provided upon request, wherein the Requesting Party specifies: – place, time, character and scale of the Disaster, and current state of the Emergency in the afflicted area; – actions already carried out, specification of the required Assistance, setting the priorities of the requested Disaster Relief."); Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 6 ("The Party requesting assistance must specify the nature and scope of the assistance which it requires."); Protocol between the Kingdom of Spain and the Portuguese Republic on Technical Cooperation and Mutual Assistance in the Field of Civil Defence, of 9 March 1992, United Nations, *Treaty Series*, vol. 1730, No. 30218, art. 3 (7) ("The overall management of operations shall, in all cases, be the responsibility of the authorities of the territory in which the disaster occurs. Nevertheless, the units of the donor country shall act through their own national leaders, whom the head of the expedition shall apprise of the objectives and missions to be accomplished.").

[211] See Agreement on reciprocal assistance in case of disasters or major accidents, of 14 January 1987, France-Switzerland, United Nations, *Treaty Series*, vol. 1541, No. 26743, art. 4 ("The nature, extent and procedures for the provision of assistance shall be determined by mutual agreement between the authorities mentioned in article 3, on a case-by-case basis."); Agreement between the Republic of Austria and the Federal Republic of Germany concerning mutual assistance in the event of disasters or serious accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 4 ("The type and extent of assistance to be provided shall be agreed upon by the authorities referred to in article 3 case by case, without necessarily going into operational detail."). See also Council of the European Union decision 2001/792/EC, Euratom, of 23 October 2001, art. 5 (3) (explaining specific limitations and details of execution of assistance intervention shall only be provided by the affected State when necessary: "The requesting Member State shall be responsible for directing assistance interventions. The authorities of the requesting Member State shall lay down guidelines and, if necessary, define the limits of the tasks entrusted to the intervention teams, without giving details of their execution, which are to be left to the person in charge appointed by the Member State rendering assistance").

C. Limitations on conditions under international and national law

161. The right of the affected State to impose conditions for the delivery of assistance is qualified by an obligation that such conditions comply with international and national laws[212] as well as treaty obligations.[213] Although such provisions textually modify general requirements for the delivery of aid, they have a clear application to the conditions an affected State may impose on assisting States, because an affected State is not to require actions in contravention of obligations otherwise stated. Consequently, although an affected State may impose conditions, including the retention of control over the provision of assistance and requirements that any assistance comply with specific national laws, such conditions may not abrogate otherwise existing duties under national and international law.[214] Further, such conditions may not contravene the provisions of any treaties, conventions or instruments to which the affected State is a party.[215] Rather, where discrepancies between agreements to which either the affected or the assisting States are parties, conditions on the provision of assistance should conform with those provisions that "afford[ed] the greatest degree of assistance in the event of disaster and favor[ed] support and protection to personnel providing assistance" (Inter-American Convention, art. XV).

162. The Special Rapporteur noted in his third report that State sovereignty rights with respect to emergency assistance must be balanced against other obligations under international law principles (A/CN.4/629, paras. 15-20), most particularly, the humanitarian principles of humanity, neutrality and impartiality as embodied by the Commission in draft article 6 (humanitarian principles in disaster response),[216] as well as human dignity (draft article 7) and human rights (draft article 8) (A/66/10,

---

[212] General Assembly resolution 46/182, annex, para. 5 (noting that assistance "should be provided in accordance with international law and national laws"). See also IFRC Guidelines, art. 4 (1), ("Assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times."); Max Planck Guidelines, para. 9 (b) ("Humanitarian assistance shall only be provided in accordance with the principles and rules of international law.") and 22 (d) ("assisting personnel [shall] respect the laws of the domestic State"); United Nations Convention on the Rights of Persons with Disabilities, art. 11 (requiring States to take measures "in accordance with their obligations under international law").

[213] ASEAN Agreement, art. 30 ("The provisions of this Agreement shall in no way affect the rights and obligations of any Party with regard to any existing treaty, convention or instrument to which they are Parties."); Inter-American Convention, art. XV ("If there is any discrepancy between this Convention and other international agreements on the subject to which the assisting and assisted states are parties, the provision that affords the greatest degree of assistance in the event of disaster and favors support and protection to personnel providing assistance shall take precedence.").

[214] General Assembly resolution 46/182, annex, para. 5 (requiring that assistance "should be provided in accordance with international law and national laws"). See also IFRC Guidelines, art. 4 (1) ("Assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times."); Max Planck Guidelines, paras. 9 (b) and 22 (d) (providing that "[h]umanitarian assistance shall only be provided in accordance with the principles and rules of international law" and "assisting personnel [shall] respect the laws of the domestic State"); Convention on the Rights of Persons with Disabilities, art. 11 (requiring States to take measures "in accordance with their obligations under international law").

[215] ASEAN Agreement, art. 30.

[216] See also General Assembly resolution 46/182, annex, para. 2; IFRC Guidelines, art. 4 (2).

para. 288). Further, the Commission has found that such principles should not be construed in a limiting fashion — as only those explicitly enshrined in international agreements — but rather as "obligations applicable on States by way of customary international law, [including] assertions of best practices".[217] Consequently, State obligations under international law pertaining, inter alia, to the environment and sustainable development may also serve to circumscribe the conditions an affected State may impose for the provision of assistance. Where the national laws of an affected State provide protections in excess of international standards and the affected State has not agreed to waive such additional protections in order to facilitate the delivery of assistance, assisting States must comply with the national laws of the affected State.[218] Applicable principles that may serve to balance the right of an affected State to impose conditions on the delivery of assistance are detailed below.

1. Core humanitarian obligations

163. As stated in paragraph 2 of the Guiding principles found in the annex to General Assembly resolution 48/182, "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality". That formulation reflects the language of the Secretary-General in his 2009 report entitled "Strengthening the coordination of emergency humanitarian assistance of the United Nations" (A/64/84-E/2009/87, para. 23):

> "Respect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are therefore critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need."

164. These humanitarian principles are discussed extensively in the Special Rapporteur's third report (A/CN.4/629, paras. 14-50). They are found in a number of documents,[219] including the Fundamental Principles of ICRC.[220] The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), provides that: "States Parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality, and independence of humanitarian actors".[221] Conditions set by affected States on the acceptance of aid must not contravene those principles.

165. States may not impose conditions for the provision of assistance that do not comport with the principle of humanity. This principle initially developed in

---

[217] Statement by the Chairman of the Drafting Committee on 20 July 2010 (see A/CN.4/SR.3067).

[218] See, for example, General Assembly resolution 46/182, annex, para. 5 (requiring that assistance "be provided in accordance with international law and *national laws*") [emphasis added]; IFRC Guidelines, art. 4 (1) ("Assisting actors and their personnel should abide by the law of the affected State."); and Max Planck Guidelines, para. 22 (d) ("assisting personnel [shall] respect the laws of the domestic State").

[219] See A/CN.4/629, para. 18, and footnote 18; 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, available from www.ifrc.org/en/publications-and-reports/code-of-conduct/ (with 492 signatories at time of writing).

[220] ICRC, The Fundamental Principles of the Red Cross: Commentary, 1979, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm.

[221] Kampala Convention, adopted on 22 October 2009, art. 5, para. 8.

humanitarian law,[222] but has since been recognized as applying in both war and peace. In the *Corfu Channel* case, the International Court of Justice found that the obligations incumbent on State authorities were based "on certain general and well-recognized principles, namely: elementary considerations of humanity, more exacting in peace than in war".[223]

166. The principle of humanity is extended to the context of disaster relief by the Oslo Guidelines and the Mohonk Criteria, which affirm that "human suffering must be addressed wherever it is found".[224] The dignity and rights of all victims must also be respected and protected.[225] The Kampala Convention, in article 3 (1), para. (c), requires that States Parties "respect and ensure respect for the principles of humanity and human dignity of internally displaced persons". Humanity is a fundamental principle of IFRC,[226] and its Guidelines (art. 4 (1)) recommend that: "[a]ssisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times". The principle of humanity, therefore, requires that affected States, in imposing conditions for the provision of aid, do so only in ways that respect the human dignity of those affected.

167. Conditions imposed for the provision of aid by an affected State must adhere to the principle of neutrality. The principle of neutrality is described by the Red Cross and Red Crescent Movement as the notion that "[h]umanitarian assistance should be provided without engaging in hostilities or taking sides in controversies of a political, religious, or ideological nature".[227] This wording is echoed in the Mohonk Criteria.[228] It is clear from this formulation that neutrality is relevant in disaster situations, and not merely in the context of conflict.[229] In his third report, the Special Rapporteur noted that "the affected State must respect the humanitarian nature of the response activities and 'refrain from subjecting it to conditions that

---

[222] See, for example, the Convention (III) relative to the Treatment of Prisoners of War (12 August 1949), art. 3 (1), para. (c); the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St. Petersburg, 11 December 1868; Convention (II) with respect to the Laws and Customs of War on Land, 29 July 1899, preamble.

[223] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment* of 9 April 1949, *I.C.J. Reports 1949*, p. 22.

[224] See Oslo Guidelines, para. 20; Mohonk Criteria, p. 196.

[225] Mohonk Criteria, p. 196; ICRC Fundamental Principles, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm#a3.

[226] IFRC, "The Seven Fundamental Principles", available from www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/.

[227] Resolution IX of the twentieth International Conference of the Red Cross (Vienna, 1965).

[228] See footnote 194 above.

[229] See, for example, Council of the International Institute of Humanitarian Law, "Guiding principles on the right to humanitarian assistance", April 1993, preambular para. 5 ("Stressing that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all human activities; the principles of humanity, neutrality, and impartiality, so that political considerations should not prevail over those principles."). See also D. Plattner, "ICRC neutrality and neutrality in humanitarian assistance", *International Review of the Red Cross*, No. 311, 1996, p. 165 ("Returning to the essence of neutrality and allowing it a scope which encompasses its possible implications in peacetime, neutrality may therefore be understood as a duty to abstain from any act which, in a conflict situation, might be interpreted as furthering the interests of one party to the conflict or jeopardizing those of the other.").

divest it of its material and ideological neutrality'".[230] Therefore, conditions set by affected States on the acceptance of aid must be "neither partisan or political acts nor substitutes for them" (A/CN.4/629, para. 28).

168. The incidence of a disaster does not absolve an affected State from its obligation to refrain from promulgating conditions for the provision of aid that violate the principle of impartiality. The principle of impartiality, which is commonly understood to include non-discrimination, refers to the doctrine that aid must be provided "without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering of individuals must be guided solely by their needs and priority must be given to the most urgent cases of distress".[231] All human rights instruments take into account the principle of non-discrimination either explicitly or implicitly (ibid., para. 32). For example, the Charter of the United Nations describes, in Article 1, paragraph 3, one of the purposes of the Organization as follows:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

169. Impartiality and non-discrimination are not per se violated, however, by conditions that funnel aid to those with the most urgent needs.[232] Other agreements, such as the Convention establishing an International Relief Union, make explicit the applicability of the principle of non-discrimination in the context of disaster relief.[233] Non-discrimination is addressed specifically in the context of emergency situations in the International Covenant on Civil and Political Rights, which allows suspension of certain obligations "provided that such measures ... do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".[234] It therefore follows that affected States are not free to derogate from the principle of impartiality in conditioning their acceptance of aid.

2. Human rights

170. While States have broad latitude in specifying the kind and extent of assistance they need, they may not place restrictions on assistance that compromise their obligations under international law. Existing human rights obligations under human rights law do not cease in the wake of a disaster. As outlined by the Special Rapporteur in his fourth report, disasters implicate numerous human rights, such as the rights to food and water and the right to adequate housing (see A/CN.4/643, para. 32).

---

[230] A/CN.4/629, para. 29 (quoting Ruth Abril Stoffels, "Legal regulation of humanitarian assistance in armed conflicts: achievements and gaps", *International Review of the Red Cross*, vol. 86, No. 855, p. 539).

[231] Mohonk Criteria, p. 196; Resolution IX of the twentieth International Conference of the Red Cross (Vienna, 1965).

[232] ICRC Fundamental Principles, Commentary, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm#a3.

[233] League of Nations, *Treaty Series*, vol. 135, p. 247, art. 3. See also Framework Convention on Civil Defence Assistance, United Nations, *Treaty Series*, vol. 2172, No. 38131, art. 3 (c); BSEC Agreement, art. 3, para. 1 (see footnote 140 above).

[234] International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 4.

The affected State may not impose restrictions on assistance that will violate or infringe upon those rights.

171. Similarly, a State's obligations to vulnerable or disadvantaged groups, such as women, children, people with disabilities and indigenous or minority cultural groups, continue to apply in a disaster situation.[235] In fact, disaster situations may impose added duties on States to ensure the safety of vulnerable populations. For instance, the Convention on the Rights of Persons with Disabilities requires, in article 11, that States take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including ... the occurrence of natural disasters".[236]

172. The Hyogo Framework for Action 2005-2015 underscores the importance of human rights considerations in the disaster-planning process, urging States to adopt "a gender perspective" in disaster risk management and to take into account "cultural diversity, age, and vulnerable groups" in disaster risk reduction.[237] To the extent that humanitarian assistance contributes to disaster planning and risk management, affected States must condition acceptance on the assurance that the aid will provide adequately for vulnerable groups.

3. Reconstruction and sustainable development

173. In its commentary to draft article 1 on Scope (A/65/10, para. 331, para. (4)), the Commission indicated that the scope *ratione temporis* "is primarily focused on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase". To the extent that reconstruction is a continuation of relief efforts, and starts almost immediately after a disaster occurs, sustainable development considerations might come into play early in the disaster response process and merit, therefore, some brief reference here. This is not to ignore that reconstruction remains different from relief work and that the rights and obligations of States in the two contexts may differ considerably. When assistance will contribute to reconstruction efforts, the affected State may be required to condition its acceptance on the assurance that reconstruction will ameliorate, not just restore, previous conditions. For instance, the International Covenant on Economic, Social and Cultural Rights identifies, in article 11, paragraph 1, the universal right to "housing, and to the continuous improvement of living conditions".[238] Improving living conditions in the wake of a disaster that has destroyed settlements may require an affected State to ensure that new housing will be more resilient to future disasters and that future land use decisions will not perpetuate vulnerabilities.

174. Similarly, the international goal of sustainable development is highlighted in the wake of a disaster. As the Hyogo Framework for Action notes, in paragraph 13, "disaster risk reduction is a cross-cutting issue in the context of sustainable development and therefore an important element for the achievement of internationally agreed[-upon] development goals". Those goals have been set in principle 4 of the Rio Declaration on Environment and Development, which

---

[235] Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, No. 20378; Convention on the Rights of the Child, United Nations, *Treaty Series*, vol. 1577, No. 27531.

[236] See footnote 129 above.

[237] See footnote 155 above.

[238] See footnote 133 above.

provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[239]

175. Agenda 21,[240] adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, echoes this principle, setting forth as a broad objective the promotion of "human settlement development through environmentally sound physical planning and land use". Furthermore, in the disaster context, it recognizes the importance of post-disaster reconstruction in "mitigat[ing] the negative impact of natural and man-made disasters on human settlements, national economies and the environment". Likewise, Agenda 21 views the international community "as a major partner in post-[disaster] reconstruction and rehabilitation", by providing funds and expertise to affected States to develop long-term disaster planning and mitigation policies.

176. The Millennium Declaration lists respect for nature as a "fundamental value" "essential to international relations", and asserts that "prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development".[241] The Declaration identifies international cooperation "to reduce the number and effects of natural and man-made disasters" as a key means to protecting the environment.[242]

177. The Hyogo Framework for Action also emphasizes, in paragraph 22, the nexus between disaster risk reduction and sustainable development and the importance of cooperation among States and the international community in developing the "knowledge, capacities and motivation needed to build disaster-resilient nations and communities". The Framework further specifies, in paragraph 13, that post-disaster humanitarian assistance should be used "in such a way that risks and future vulnerabilities will be lessened as much as possible". That language suggests that affected States should, to the extent possible, ensure that the assistance they receive will enable them to develop safely and sustainably.

4. Obligations under national laws

178. In addition to complying with international law, conditions on the delivery of assistance must comply with national laws.[243] An affected State may condition its acceptance of aid on compliance with its national laws.[243] Affected States also have an obligation to follow their own national laws when they set conditions for the provision of aid. This obligation derives from the well-established duty to respect the rule of law.[244] This obligation does not restrict the ability of affected States to modify or waive certain laws when necessary to facilitate the provision of aid.

179. International law requirements restricting conditions that may be imposed by affected States constitute a baseline for the obligations of affected States to their

---

[239] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

[240] Ibid., resolution 1, annex II, paras. 7.28, 7.58 and 7.62.

[241] General Assembly resolution 55/2 of 8 September 2000, para. 6.

[242] Ibid., para. 23.

[243] See General Assembly resolution 46/182, annex, para. 5.

[244] Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 6.

populations, and should not be considered exhaustive. Affected States may enact national laws that provide protections to their populations in excess of international standards and condition their acceptance of aid on compliance with such higher standards. This principle is well supported by the core duty of States to respect the rule of law, which is foundational in the history in international law.[245]

180. Consequently, affected States have a duty to respect and follow their own laws when imposing conditions for the provision of aid. While an affected State may enter into agreements with other States to modify or harmonize its national laws in order to facilitate the provision of external assistance, such agreements may not abrogate national standards for other purposes. Where no such agreement exists, assisting States must comply with the national laws of the affected State, even where they impose higher standards than those existing under international law.

181. Bearing the foregoing considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 13
Conditions on the provision of assistance

The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law.

VI. Termination of assistance

182. The draft articles adopted thus far provide a framework for the affected State to guide the provision of assistance to suit its needs. Draft article 9 ensures that the affected State maintains direction, control, coordination and supervision of any assistance provided. Draft article 11 gives the affected State the right to refuse an offer of assistance, but not arbitrarily. The foregoing suggests that when an affected State does accept an offer of assistance, it retains a measure of control over the duration for which that assistance will be provided, and assisting actors are correspondingly obliged to leave the territory of the affected State upon request. Both parties remain duty-bound to cooperate according to draft article 5, and the context of termination of the assistance is no exception. The instruments addressing this question echo this duty by routinely articulating a preference for a collaborative approach in which both parties reach an amicable agreement on when the period of assistance will come to an end and the assisting actor will leave the territory.

183. International instruments bearing on this topic have addressed termination of assistance in a number of ways. As the Secretariat Memorandum has acknowledged, "termination provisions contain subtle differences in formulation which could have a significant impact in practice" (A/CN.4/590, para. 247).

184. Several instruments mark the end of the period of assistance with a notification from either party. Thus, the Tampere Convention provides, in article 6 (1), that "The requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided … by providing notification in

---

[245] Ibid. The Secretary-General has defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".

writing. Upon such notification, the States Parties involved shall consult with each other to provide for the proper and expeditious conclusion of the assistance." The Draft Convention on Expediting the Delivery of Emergency Assistance provides that "[t]he receiving State or an assisting State or organization may give notice of termination of assistance and where necessary the Parties to this Convention which are affected by such notice shall then arrange to bring the assistance to an orderly conclusion under the terms of this Convention".[246] Similarly, article 12 of the IFRC Guidelines states: "When an affected State or an assisting actor wishes to terminate disaster relief or initial recovery assistance, it should provide appropriate notification. Upon such notification, the affected State and the assisting actor should consult with each other …". The BSEC Agreement[247] and the Agreement Between the Government of the Republic of Mozambique and the Government of the Republic of South Africa Regarding the Coordination of Search and Rescue Services[248] contain similar provisions.

185. A China-United States agreement of 1947 allowed the receiving State to terminate the agreement "whenever it deems that such relief assistance as is provided in this Agreement is no longer necessary", but established a series of conditions necessary for the assisting State to terminate the assistance.[249] The Nordic Mutual Assistance Agreement in Connection with Radiation Accidents[250] provides that a receiving State may request termination of disaster relief assistance "any time", but that the assisting State may only terminate its assistance if, in its opinion, certain conditions are met.

186. Some instruments allow the affected State to request the termination of assistance, after which both parties shall consult with each other to that effect. For example, article 11 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that:

> "[t]he requesting State … may at any time, after appropriate consultations [with the assisting actor] and by notification in writing, request the termination of assistance received … under this Convention. Once such a request has been made, the parties involved shall consult with each other to make arrangements for the proper conclusion of the assistance."[251]

---

[246] Draft Convention on Expediting the Delivery of Emergency Assistance, 1984 (A/39/267/Add.2-E/1984/96/Add.2), annex, art. 18.

[247] BSEC Agreement, art. 13 (1) ("The Requesting Party may cancel its request for assistance at any time. The Requesting Party shall inform the Assisting Party immediately about its decision.").

[248] See Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa regarding the Coordination of Search and Rescue Services, 2002, art. 12 ("This Agreement may be terminated by either Party giving written notice through the diplomatic channel to the other Party of its intention to terminate this Agreement.").

[249] Agreement concerning the United States relief assistance to the Chinese people (with Exchange of Notes) of 27 October 1947, China-United States of America, United Nations, *Treaty Series*, vol. 12, No. 178, art. IX.

[250] Nordic Mutual Assistance Agreement in Connection with Radiation Accidents of 17 October 1963, Denmark, Finland, Norway and Sweden-International Atomic Energy Agency, United Nations, *Treaty Series*, vol. 525, No. 7585, art. X (1), (3) ("1. The Requesting State may at any time in writing request the termination of the assistance provided under this Agreement. … 3. Upon such request for, or notice of, termination the Requesting State and the Assisting Party shall consult together with a view to concluding any operations in progress at the time of such termination and facilitating withdrawal of the assistance.").

[251] See footnote 96 above.

The CDERA Agreement (art. 20 (2) and (3)), the Convention on the Transboundary Effects of Industrial Accidents (annex X, para. 10) and the Max Planck Guidelines[252] also include similar provisions.

187. Bearing the foregoing in mind, the Special Rapporteur proposes the following draft article:

Draft article 14
Termination of assistance

The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.

VII. Related developments

188. During the period between the Commission's sixty-third session and the date of the present report, two related developments deserve to be singled out.

189. The third session of the Global Platform for Disaster Risk Reduction was held in Geneva from 8 to 13 May 2011. It built on the findings and recommendations of the Global Platform's second session in 2009, as well as the results of the midterm review of the Hyogo Framework for Action and the 2011 Global Assessment Report on Disaster Risk Reduction.[253] The Platform Chair's Summary highlights consensus points and outlines critical steps to be taken.

190. The 31st International Conference of the Red Cross and Red Crescent was held in Geneva from 28 November to 1 December 2011. On the occasion of the Conference, IFRC made available a pilot version (November 2011) of a "Model Act for the Facilitation and Regulation of International Relief and Recovery Assistance", consisting of 71 articles together with commentaries. It is intended that a final version be produced by the end of 2012. By its resolution No. 7 entitled "Strengthening Disaster Law", the Conference, inter alia, welcomed the efforts to develop a Model Act "to assist States interested in incorporating the recommendations of the IDRL Guidelines into their legal frameworks" (para. 5) and invited "further consultation with States and other stakeholders on the use of the Model Act as a reference tool" (para. 6). As is known, the IFRC International Disaster Response Law (IDRL) project, launched in 2001, developed the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance", adopted at the 30th International Conference in 2007. The IFRC has announced that its IDRL programme has become the IFRC "Disaster Law Programme".

---

[252] Max Planck Guidelines, art. 18 ("receiving State ... may determine in consultation with the assisting State or organization the moment of ... termination of such assistance") and art. 23 ("assisting State or organization and the receiving State shall cooperate to resolve any irregularities, difficulties or disputes arising ... upon the termination of humanitarian assistance operations").

[253] United Nations International Strategy for Disaster Reduction, "Revealing Risk, Redefining Development: Global Assessment Report on Disaster Risk Reduction", 2011.

United Nations A/CN.4/653

General Assembly

Distr.: General
30 May 2012

Original: English

International Law Commission
Sixty-fourth session
Geneva, 7 May-1 June and 2 July-3 August 2012

Formation and evidence of customary international law

Note by Michael Wood, Special Rapporteur

I. Introduction

A. Inclusion of the topic in the programme of work of the International Law Commission

1. A proposal for a new topic entitled "Formation and evidence of customary international law" was discussed in the Working Group on the Long-term Programme of Work during the sixty-second and sixty-third sessions of the International Law Commission in 2010 and 2011.[1] The present note should be read together with the syllabus attached as annex A to the Commission's 2011 report (A/66/10), which contains an extensive list of background materials. Annex A began by noting that:

> Questions relating to sources lie at the heart of international law. The Commission's work in this field has been among its most important and successful, but has been largely confined to the law of treaties.

2. At its sixty-third session, the Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work, on the basis of the syllabus at annex A (see A/66/10, para. 365).

3. Support was expressed for the topic in the Sixth Committee during the sixty-sixth session of the General Assembly in 2011. It was suggested that the outcome should result in a practical guide, with commentaries, for judges, government lawyers and practitioners. While the point was made that the aim should not be to codify the topic itself, it was also observed that it would be difficult to systematize the formative process without undermining the very essence of custom, its

---

[1] See A/66/10, paras. 32 and 365. The Working Group was reconstituted by the Planning Group of the International Law Commission each year during the last quinquennium, and was chaired by Enrique Candioti.

Please recycle

flexibility and constant evolution. Concerning the methodology, the importance of making a differentiation between State practice and jurisprudence of international courts and tribunals on the one hand, and the practice and jurisprudence of domestic courts on the other, was stressed. The Commission was also urged to proceed with caution in considering the role of unilateral acts in identifying customary international law (A/CN.4/650, para. 65).

4. By paragraph 7 of its resolution 66/98 of 9 December 2011, the General Assembly took note of the decision of the Commission to include the topic "Formation and evidence of customary international law" in its long-term programme of work, and also of the respective comments made by Member States in the Sixth Committee.

5. At its sixty-fourth session, the Commission decided to place the topic "Formation and evidence of customary international law" on its current programme of work and appointed Sir Michael Wood as Special Rapporteur for the topic (see A/CN.4/SR.3132).

6. The present note sets out the Special Rapporteur's initial thoughts, particularly on the scope of the topic. It also outlines a tentative programme of work for the consideration of the topic, and if possible its conclusion, during the present quinquennium (2012-2016).

7. Section II of the note lists a number of preliminary points that will need to be covered. In section III the Special Rapporteur discusses the scope of the topic and possible outcomes of the Commission's work on the topic. A tentative programme of work is set out in section IV.

B. Aim of the present note

8. The discussions that took place within the Working Group on the Long-term Programme of Work during the last quinquennium were of great assistance in formulating the syllabus for the topic presented in annex A to the Commission's report to the General Assembly (A/66/10). Annex A sought to reflect many of the views expressed in the Working Group. But, for obvious reasons, many of the present members of the Commission did not take part in those discussions.

9. This note has been prepared in order to stimulate an initial debate and exchange of views on the topic during the second part of the Commission's sixty-fourth session. Rather than attempt to get into details, it is more in the nature of a series of headline points, aimed at giving a broad overview of the topic and offering a focus (or a target) for the Commission's discussions in the second part of the current session.

10. The Special Rapporteur's principal aim during the second part of the present session is to seek initial views of members of the Commission on the scope of the topic, the methodology to be employed and possible outcomes. The Special Rapporteur would benefit greatly from hearing the initial views of the members of the Commission on the topic in general, in the light of the preliminary thoughts in the following sections of the note. Those views will assist in the drafting of the first (preliminary) report in good time for the Commission's sixty-fifth session in 2013.

II. Preliminary points

11. The following points could be covered in a first preliminary report, in 2013.

A. Previous work of the Commission related to the topic

12. Much of the Commission's work has been concerned with the identification of customary international law, though it has often been cautious about distinguishing between the codification of international law and its progressive development. It dealt directly with the formation of customary international law, for example, in connection with what became article 38 of the Vienna Convention on the Law of Treaties of 1969. And in its first years, the Commission had on its agenda the topic "Ways and means of making the evidence of customary international law more readily available".[2]

B. Work of the International Law Association on the formation of customary international law

13. The work of the International Law Association, between 1984/85 and 2000, culminated in the adoption in 2000 of the *London Statement of Principles Applicable to the Formation of General Customary International Law* (with commentary).[3] The Association's work, which consists of 33 principles and associated commentary, resulted in both supporting and critical reactions, which can be reviewed as well.

C. Customary international law as a source of public international law and its relationship to other sources

14. By way of background, it may be interesting to look at the *travaux préparatoires* of Article 38.1 of the Statute of the International Court of Justice, which is often regarded as "badly drafted".[4] The relationship between customary international law and treaties is an important aspect of the topic, to be discussed in detail in a later report. Also to be covered is the relationship of "customary international law" to "general international law", "general principles of law" and "general principles of international law". (The term "general international law" is

---

[2] At its first and second sessions in 1949 and 1950, the International Law Commission, in accordance with the mandate in article 24 of its statute, considered the topic "Ways and means of making the evidence of customary international law more readily available". The outcome was an influential report which led to various important publications on a national and international level (see *Yearbook of the International Law Commission, 1950*, vol. II, document A/1316, paras. 24-94).

[3] Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association. See *International Law Association, Report of the Sixty-ninth Conference, London*, p. 39. For the plenary debate, see pp. 922-926. The *London Statement of Principles* is at pp. 712-777, and the report of the Working Session of the Committee on Formation of (General) Customary International Law held in 2000 is at pp. 778-790. The Committee's six interim reports contain more detailed material.

[4] Ibid., final report of the Committee on the Formation of Customary (General) International Law, para. 6.

often to be found nowadays, but seems to have a somewhat different connotation from "customary international law".) It is important to distinguish between rules of customary international law and comity/mere usage, as well as between customary law and "soft law", and between *lex lata* and *lex ferenda*.

D. Terminology/definitions

15. To set the scene there should be some discussion of the use and meaning of the term "customary international law" or "rules of customary international law", which seem to be the expressions in most common use (others are "international customary law", "custom" and "international custom"). The establishment of a short lexicon of relevant terms, in the six official languages of the United Nations, could be useful.

E. Importance and role of customary international law within the international legal system

16. It could be useful to discuss briefly customary international law "as law", and the challenges that have occasionally been addressed to its role within the international legal system.

F. Theories of custom and approaches to the identification of rules of customary international law

17. A brief description of the principal theories of custom, as they emerge from writings on the subject, may assist in informing the approach to be eventually adopted by the Commission. The theoretical underpinnings of the subject are important (for example, as to the relative roles of practice and *opinio juris*), even though the ultimate aim will be to provide a practical aid to those called upon to investigate rules of customary international law.

G. Methodology

18. In the preliminary view of the Special Rapporteur, the most reliable guidance on the topic is likely to be found in the case law of international courts and tribunals, particularly the International Court of Justice and the Permanent Court of International Justice. The preliminary report could include a descriptive survey of the approach to customary international law by international judicial bodies, chiefly in the case law of the International Court.[5] Guidance may also be found in the case law of national courts, codification efforts by non-governmental organizations and the writings of publicists.

19. It will be necessary to address general questions of methodology, such as the relative weight to be accorded to empirical research into State practice, as against deductive reasoning. The difficulties and options are well set out in the introduction

---

[5] See, most recently, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening), Judgment*, 3 February 2012, para. 55, where the Court refers to "the criteria which it has repeatedly laid down for identifying a rule of customary international law".

to the final report of the Committee of the International Law Association.[6] It is also the case that practical considerations may affect methodology, especially in a world of nearly 200 States, but this is not really a new problem. The practice of other international persons, in particular international organizations, may also be important.

III. Scope of the topic and possible outcomes of the Commission's work

20. On a practical level, it is important to define the scope of the topic, and to consider possible outcomes, at an early stage. The purpose of the present section of the note is to assist the Commission to do that. In the first paragraph of annex A to the Commission's 2011 report (A/66/10), it was said that the title of the topic "would not preclude the Commission from entering upon related aspects if this proved desirable, but the focus would be on formation (the process by which rules of customary international law develop) and evidence (the identification of such rules)". The Special Rapporteur considers that this statement accurately describes the scope of the topic.

21. To avoid unnecessary overlap, the scope of the topic needs to be clearly delimited in relation to other topics that have been on the Commission's agenda, past and present. These include "Fragmentation of international law: difficulties arising from the diversification and expansion of international law"[7] and "Treaties over time".[8] This should not be difficult in practice; the dividing lines are likely to be reasonably clear. For example, while the effect of treaties on the formation of customary international law is part of the present topic, the role of customary international law in the interpretation of treaties is not.

22. The topic will cover the whole of customary international law. It is the view of the Special Rapporteur that, given the unity of international law and the fact that "international law is a legal system" (A/61/10, para. 251 (1)), it is neither helpful nor in accordance with principle, for the purposes of the present topic, to break the law up into separate specialist fields. The same basic approach to the formation and identification of customary international law applies regardless of the field of law under consideration. The Commission's work on this topic will be equally relevant to all fields of international law, including, for example, "customary human rights law", "customary international humanitarian law" and "customary international criminal law". It is, however, for consideration whether, and if so to what degree, different techniques might be appropriate for the identification of particular rules of customary international law.[9]

---

[6] International Law Association (note 3 above), final report of the Committee on the Formation of Customary (General) International Law, paras. 1-10.

[7] For the outcome of the Commission's work on that topic, see A/61/10, para. 251 and A/CN.4/L.682 and Corr.1 and Add.1.

[8] For a summary of the Commission's work on that topic from 2008 to 2011, see A/66/10, paras. 333-344.

[9] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening), Judgment*, 3 February 2012, para. 73 ("for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions … .").

23. A particular question to consider is whether the topic should include the emergence of new peremptory norms of general international law ("*jus cogens*").[10] The Special Rapporteur's present view is that this is a separate matter, which should not be dealt with as part of the present topic. For example, peremptory norms may be found in treaties just as much as in customary international law.[11]

24. It should not be expected that the outcome will be a series of hard-and-fast rules for the determination of rules of customary international law.[12] Instead, the aim is to elucidate the process of the formation and determination of rules of customary international law, through guidance and practice. A starting point for a discussion of the overall aim of the Commission's consideration of the topic could be found in annex A (A/66/10, annex A, para. 4):

> The aim is not to seek to codify "rules" for the formation of customary international law. Instead, the aim is to produce authoritative guidance for those called upon to identify customary international law, including national and international judges. It will be important not to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. In view of this, the Commission's final output in this field could take one of a number of forms. One possibility would be a series of propositions, with commentaries.

25. The Special Rapporteur suggests that the appropriate outcome for the Commission's work on the present topic should be a set of "conclusions" with commentaries.[13]

IV. Tentative schedule for the development of the topic

26. In its 2011 report to the General Assembly, the Commission set out, in lapidary fashion, what is expected of Special Rapporteurs (see A/66/10, para. 372). Among other things, they are expected to prepare each year a substantive report, preferably limited to no more than 50 pages. In connection with the work of the Planning Group, the Commission said that the Group "should cooperate with Special Rapporteurs and coordinators of Study Groups to define, at the beginning of any new topic, a tentative schedule for the development of the topic over a number of years as may be required, and periodically review the attainment of annual targets in such schedule, updating it when appropriate" (A/66/10, para. 378 (iii)).

27. In annex A it was suggested that, for convenience, the topic should be considered in four stages: underlying issues and collection of materials; some central questions concerning the identification of State practice and *opinio juris*;

---

[10] Vienna Convention on the Law of Treaties, 1969, art. 64.

[11] The same conclusion was reached by the Committee of the International Law Association: see International Law Association (note 3 above), final report of the Committee on the Formation of Customary (General) International Law, introduction, para. 8.

[12] The Committee of the International Law Association refers to "a statement of the relevant rules and principles, as the Committee understands them. … some practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. Many have a need for relatively concise and clear guidelines on a matter which often causes considerable perplexity …" (ibid., para. 4).

[13] A similar approach was adopted by the Committee of the International Law Association: see note 4 above.

particular topics; and conclusions (A/66/10, annex A, para. 6). The following tentative schedule is therefore proposed for the development of the topic "Formation and evidence of customary international law":

> 2012: Preliminary note and initial discussion within the Commission. The main aim is to enable the Special Rapporteur to gather initial views from members of the Commission concerning the scope, methodology and possible outcome of the work on the topic, and to consider information to be sought from States.[14]
>
> 2013: First report of the Special Rapporteur (on some preliminary points, including those mentioned in section II above), and gathering further materials.
>
> 2014: Second report of the Special Rapporteur (discussing State practice and *opinio juris*).[15] This report would contain some "conclusions".
>
> 2015: Third report of the Special Rapporteur (on certain particular topics[16]). This report too would contain further "conclusions".
>
> 2016: Fourth report of the Special Rapporteur: consolidated and reworked full set of "conclusions", for discussion and adoption by the Commission.

---

[14] Such information could include (a) any official statements (e.g., in court proceedings) concerning the formation of international customary law; (b) any significant cases in national or regional courts shedding light on; (c) any writings or work being done at national institutes (beyond what is listed in annex A).

[15] Paragraph 8 of annex A suggested that the second stage could cover some central questions of the traditional approach to the identification of rules of customary international law, in particular State practice and *opinio juris*:

(i) Identification of State practice. What counts as "State practice"? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law? Decisions of domestic courts and tribunals (and the executive's response thereto). Beyond the State, whose acts? Certain international organizations, like the European Union? "Representativeness" of State practice (including regional diversity).

(ii) Nature, function and identification of *opinio juris sive necessitatis*.

(iii) Relationship between the two elements: State practice and *opinio juris sive necessitatis*, and their respective roles in the identification of customary international law.

(iv) How new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

(v) The role of "specially affected States".

(vi) The time element, and the density of practice; "instant" customary international law.

(vii) Whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

[16] Paragraph 9 of annex A suggested that a third stage could cover particular topics such as:

(i) The "persistent objector" theory.

(ii) Treaties and the formation of customary international law; treaties as possible evidence of customary international law; the "mutual influence"/interdependence between treaties and customary international law.

(iii) Resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

(iv) Formation and identification of rules of special customary international law between certain States (regional, subregional, local or bilateral — "individualized" rules of customary international law). Does consent play a special role in the formation of special rules of customary international law?

United Nations

A/CN.4/654

General Assembly

Distr.: General
31 May 2012

Original: English/Spanish

International Law Commission
Sixty-fourth session
Geneva, 7 May-1 June and 2 July-3 August 2012

Preliminary report on the immunity of State officials from foreign criminal jurisdiction

Prepared by Ms. Concepción Escobar Hernández, Special Rapporteur

Contents

Page

I. Introduction . . . 2

II. Consideration of the topic during the quinquennium 2007-2011 . . . 3

A. An overview of work by the former Special Rapporteur . . . 4

B. The debate in the International Law Commission . . . 7

C. The debate in the Sixth Committee of the General Assembly . . . 9

III. The topic "immunity of State officials from foreign criminal jurisdiction" during the present quinquennium: issues to be considered . . . 11

A. Immunity *ratione personae* and immunity *ratione materiae* . . . 12

B. The international responsibility of the State and the international responsibility of individuals: implications for immunity . . . 13

C. Immunity *ratione personae* . . . 14

D. Immunity *ratione materiae* . . . 15

E. Procedural aspects of immunity . . . 16

IV. Workplan . . . 16

Please recycle

I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006), on the basis of the proposal contained in annex A to the report of the Commission for that session (see A/61/10, para. 257 and annex A). At its fifty-ninth session (2007), the Commission decided to include the topic in its current programme of work and appointed Roman A. Kolodkin as Special Rapporteur (A/62/10, para. 376). At the same session, the Secretariat was requested to prepare a background study on the topic.[1]

2. The former Special Rapporteur submitted three reports, which were discussed by the Commission at its sixtieth (2008) session (A/CN.4/601) and its sixty-third (2011) session (A/CN.4/631 and A/CN.4/646). In the preliminary report (A/CN.4/601), the Special Rapporteur provided the background to the consideration of the question of immunity of State officials from foreign jurisdiction by the Commission and other learned institutions (paras. 6-26), outlined the preliminary range of aspects implicated by the topic (paras. 27-101) and identified issues which the Special Rapporteur viewed as worthy of consideration in determining the overall scope of the topic (paras. 102-129). In the second report (A/CN.4/631), the Special Rapporteur, following a review of developments that had taken place since the issuance of the preliminary report (paras. 6-16), provided a substantive overview and analysis of questions concerning the scope of immunity of a State official from criminal jurisdiction (paras. 17-89). In the third report (A/CN.4/646), unlike the preliminary and second reports, which addressed the substantive aspects of the topic, the Special Rapporteur considered its procedural aspects (paras. 11-57), while at the same time analysing the relationship between the invocation by a State of the immunity of its official and the responsibility of that State for a wrongful act committed for the same act which gives rise to the question of immunity (paras. 58-60). For each of three reports, the Special Rapporteur routinely presented a summary following a detailed analysis of the issues involved on the basis of a review of State practice, case law and the doctrine, thus providing elements of an overall picture of the issues addressed in a synthesized manner (A/CN.4/601, paras. 102 and 130; A/CN.4/631, paras. 90 and 91; A/CN.4/646, para. 61).

3. The International Law Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

4. At its 3132nd meeting, on 22 May 2012, the Commission appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Special Rapporteur would like to express her appreciation to Mr. Kolodkin for his devotion to the study of the topic. The scholarly and outstanding contribution of Mr. Kolodkin will undoubtedly assist the Commission in its work.

5. The present report is a "transitional report". It is preliminary in nature and must take into account the reports submitted by the former Special Rapporteur and the progress of the debates held by the competent United Nations bodies (the

---

[1] A/62/10, para. 386. For the Secretariat study, see A/CN.4/596 and Corr.1.

Commission and the Sixth Committee) in order to continue the work that is already under way. Therefore, the primary purpose of the present report is to help clarify the terms of the debate up to this point and to identify the principal points of contention which remain and on which the Commission may wish to continue to work in the future. The Special Rapporteur also hopes that this preliminary report will lead to a structured debate that will make it possible to meet the international community's expectations from the topic of the immunity of State officials from foreign criminal jurisdiction since 2007, when it was first included in the Commission's programme of work. For that reason, this preliminary report will identify the basic elements of the programme of work that the Special Rapporteur considers necessary to pursue in the future in order to complete work on the topic during the current quinquennium, thereby complying with the General Assembly's request that the Commission give priority to this topic in its programme of work.[2]

6. To that end, it has been decided to divide the preliminary report into four separate parts. The purpose of the first two parts will be to provide an overview of the Commission's work to date (section I), followed by a summary of the current status of the debate on the topic in the competent United Nations bodies (section II). The third part will study the major aspects of the topic which, in the Special Rapporteur's view, require special handling or consideration by the Commission in the future (section III). Lastly, the report will include an indicative programme of work, which the Special Rapporteur proposes to follow during the current quinquennium (section IV).

II. Consideration of the topic during the quinquennium 2007-2011

7. As noted above, following the inclusion of the topic in the Commission's programme of work and the appointment of the Special Rapporteur in 2007, Mr. Kolodkin submitted for the Commission's consideration three reports, which offer a broad, well-documented analysis of the question of the immunity of State officials from foreign criminal jurisdiction and present his views on the primary issues raised in that connection. On the basis of these reports, the members of the Commissions had the opportunity to formulate their opinions on various issues set out in the reports of the Special Rapporteur, as well as on general aspects of the topic. A number of States have also expressed their views on the reports of the former Special Rapporteur and on the topic in general within the framework of the Sixth Committee.

8. At these three levels, there has been significant consideration of the topic, which, in the Special Rapporteur's opinion, must be reflected in this preliminary report in order to clarify the current status of the work and of the debate on the immunity of State officials from foreign criminal jurisdiction. Therefore, these comments will be followed by three parts devoted, respectively, to the reports of Special Rapporteur Kolodkin, the debate in the International Law Commission and the debate in the Sixth Committee.

---

[2] Resolution 66/98 of 9 December 2011, para. 8.

A. An overview of work by the former Special Rapporteur

9. According to the former Special Rapporteur, the immunity of State officials from foreign criminal jurisdiction is grounded in international law, including customary international law. The immunity of State officials is often justified on the basis of the functional and representative theories. Moreover, principles of international law concerning the sovereign equality of States and non-interference in internal affairs, as well as the need to ensure the stability of international relations and the independent performance of their activities by States, all have a justificatory bearing on immunity.

10. Although immunity and jurisdiction are related concepts, as the International Court of Justice noted in the *Arrest Warrant* case, they are different. Absence of immunity does not imply jurisdiction and jurisdiction does not imply absence of immunity. Immunities remain opposable before the courts of a foreign State, even where such courts exercise such a jurisdiction on the basis of conventional rules.[3] In the view of Special Rapporteur Kolodkin, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such. It is nevertheless worth bearing in mind that the criminal jurisdiction of a State, like its entire jurisdiction over its territory, takes several forms. It may be legislative, executive or judicial, although doctrinally the executive and judicial aspects may be considered together under the rubric of executive jurisdiction. Although executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction, they are different in that many criminal procedure measures tend to be adopted at the pretrial phase of the juridical process. The question of immunity thus arises even at the pretrial phase of the criminal process.

11. The immunity of officials from foreign jurisdiction as a rule of international law means, in juridical terms, that the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned. Two related conclusions were drawn from this. First, immunity from criminal jurisdiction means primarily immunity only from executive (or executive and judicial) jurisdiction. Second, immunity from the criminal process or from criminal procedure measures does not imply immunity from the substantive law of the foreign State. In other words, immunity of State officials from foreign criminal jurisdiction is procedural in nature, not necessarily substantive. It serves as a procedural bar to criminal liability but does not in principle preclude it on the substance. The person in question may be proceeded with substantively in another appropriate forum.

12. In making suggestions for delimiting the scope of the topic, the Special Rapporteur noted that it covered only the immunity of officials of one State from the criminal jurisdiction of another State. It did not deal with questions concerning immunity from the civil jurisdiction of another State or international criminal jurisdiction. Nor did it address the question of immunity of an official from the State of his own nationality. The Special Rapporteur also doubted the advisability of giving further consideration within the framework of the topic to the question of recognition and the question of immunity of members of the families of high-ranking officials.

---

[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 at para. 59.

13. It was suggested that the topic should cover all State officials and in that regard an attempt should be made to define "State official" for the topic or to define which officials were covered by the term for the purposes of the topic.

14. The scope of the immunity from foreign criminal jurisdiction of serving officials differed depending on the level of the office held. All serving State officials enjoyed immunity in respect of acts performed in an official capacity. Only certain serving high-ranking officials additionally enjoyed immunity in respect of acts performed by them in a private capacity. The scope of immunity of former officials was identical irrespective of the level of the office which they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office. It was suggested that the doctrinal distinction drawn between immunity *ratione personae* and immunity *ratione materiae* had been useful and remained so for analytical purposes.

15. Immunity *ratione personae* is temporal in nature and ceases once a person leaves office. It inheres to a narrow circle of high-ranking State officials, and conceivably extends during the time it is enjoyed to illegal acts performed by such officials both in an official and in a private capacity, including prior to taking office. It is not affected by the fact that the acts concerning which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction. Noting that the high-ranking officials who enjoy immunity *ratione personae* by virtue of their office include primarily Heads of State, Heads of Government and ministers for foreign affairs, the Special Rapporteur suggested that an attempt be made to determine which other high-ranking officials, beyond the "troika", enjoyed immunity *ratione personae* or to define criteria for identifying such officials.

16. A State official was protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae* for acts performed by such official in an official capacity. Such immunity did not extend to acts which were performed by an official prior to taking up office. However, a former State official was protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official. The classification of conduct as official conduct did not depend on the motives of the person or the substance of the conduct. Immunity *ratione materiae* extended to *ultra vires* acts of officials and to their illegal acts. The determining factor was that the official was acting in a capacity as such. The Special Rapporteur perceived the concept of "official act" to be broader and inclusive of an "act falling within official functions". The immunity was also scarcely affected by the nature of an official's or former official's stay abroad, including in the territory of the State exercising jurisdiction. Irrespective of whether such person was abroad on an official visit or was staying there in a private capacity, he enjoyed immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official.

17. It was understood that such acts as performed were acts of the State for which the State official serves. In the view of the Special Rapporteur, this did not preclude the attribution of such acts also to the official who performed them. He suggested that there could scarcely be objective grounds for asserting that one and the same act of an official was, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction,

was not attributed as such and was considered to be only the act of an official. However, the scope of the immunity of a State and the scope of the immunity of its official were not identical, despite the fact that in essence the immunity was one and the same.

18. Of logical necessity, the issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing such conduct to the State, must be considered before the issue of the immunity of the official in connection with this conduct is considered.

19. Where charges (of being an alleged criminal, suspect, etc.) have been brought by a foreign jurisdiction against a State official, only such criminal procedure measures as are restrictive in character and would prevent him from discharging his functions by imposing a legal obligation on that person, may not be taken when the person enjoys (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the measures concerned are in connection with a crime committed by that person in the performance of official acts. Such measures may not be taken in respect of a State official appearing in foreign criminal proceedings as a witness when that person enjoys (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the case concerns the summoning of such a person to give testimony in respect of official acts performed by the person himself, or in respect of acts of which the official became aware as a result of discharging his official functions.

20. Criminal procedure measures by a foreign jurisdiction imposing an obligation on a State official violate the immunity which that official enjoys, irrespective of whether he is abroad or in the territory of his own State. A violation of the obligation not to take such measures against such a State official takes effect from the moment such a measure is taken by a foreign jurisdiction and not merely once the person against whom it has been taken is abroad.

21. The Special Rapporteur also considered the various interrelated rationales for possible exceptions to immunity from foreign criminal jurisdiction, chiefly advanced in respect of immunity *ratione materiae*, namely: (a) grave criminal acts committed by an official cannot under international law be considered as acts performed in an official capacity; (b) since an international crime committed by an official in an official capacity is attributed not only to the State but also to the official, then the latter is not protected by immunity *ratione materiae* in criminal proceedings; (c) peremptory norms of international law which prohibit and criminalize certain acts prevail over the norm concerning immunity and render immunity invalid when applied to such crimes; (d) there is a link between the existence of universal jurisdiction in respect of grave crimes and the invalidity of immunity as it applies to such crimes; (e) there is an analogous link between the obligation *aut dedere aut judicare* and the invalidity of immunity as it applies to crimes in respect of which such an obligation exists; (f) a norm of customary international law has emerged, providing for an exception to immunity *ratione materiae* in a case where an official has committed grave crimes under international law. The Special Rapporteur did not find any of these rationales to be sufficiently convincing. While pointing out that it was possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty, he concluded that it was difficult to speak of exceptions to immunity as a norm of customary international law that had developed. In the same way, it could not definitively be asserted that a trend towards the establishment of such a norm existed.

22. The one situation which he characterized as one of absence of immunity was where criminal jurisdiction was exercised by a State in whose territory an alleged crime had occurred, and that State had not consented to the performance in its territory of the activity which led to the crime, as well as to the presence in its territory of the foreign official who committed the alleged crime.

23. The Special Rapporteur also addressed the procedural aspects of the invocation of immunity. Given that the focus of the debate in the Commission has been on the substantive matters, for the time being, it may only be worthwhile to note his observation that the question of the immunity of a State official from foreign criminal jurisdiction must in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking, in respect of the official, criminal procedure measures which are precluded by immunity. Any failure to consider the issue of immunity *in limine litis* may be viewed as a violation by the forum State of its obligations under the norms governing immunity.

B. The debate in the International Law Commission

24. The Commission dealt substantively with the topic of the immunity of State officials from foreign criminal jurisdiction in 2008 (at its sixtieth session)[4] and in 2011 (at its sixty-third session).[5] Since the former Special Rapporteur did not include any draft articles in his reports, the debate among members of the Commission was always held in plenary session using an open, general format. This did not, however, prevent the members from commenting on various specific issues raised in the reports of the Special Rapporteur, including by expressing significant opinions on methodological and conceptual matters and opinions relating to the inclusion of immunity in the international legal system as a whole and its relationship to other institutions, principles and values of that system.

25. The members of the Commission generally endorsed the scope of the report proposed by the Special Rapporteur, which excluded the issues of immunity from the jurisdiction of the State of nationality of the official, immunity from international criminal courts and the immunity of officials and agents of the State, who, like diplomatic and consular officials, officials on special mission and others, are governed by ad hoc treaty rules. There was also consensus on limiting the topic to immunity from criminal jurisdiction, excluding the immunity of State officials from civil jurisdiction.

26. The members of the Commission were generally in favour of viewing immunity as an institution grounded in customary international law, as the Special Rapporteur had proposed in his preliminary report.

27. There was an interesting debate on the basis for immunity, during which some members of the Commission noted that immunity was justified by the function performed while others focused instead on the representative nature of State

---

[4] A/63/10, paras. 279-299. The Commission considered the topic at its 2,982nd to 2,987th meetings. See A/CN.4/SR.2982 to A/CN.4/SR.2987.

[5] A/66/10, paras. 116 to 140 and 159 to 185. The Commission considered the topic at its 3,086th to 3,088th, 3,111th and 3,113th to 3,115th meetings. See A/CN.4/SR.3086 to SR.3088, SR.3111 and SR.3113 to SR.3115.

officials and, ultimately, on the "personification" of the State in those officials as the justification for immunity. Some members, supporting the essentially functional nature of immunity, stressed that a *stricto sensu*, restrictive interpretation of it was therefore required. It must be borne in mind that the statements made by the members of the Commission who spoke on the topic did not make a sufficient distinction between the application of the two bases (functional and representative) for immunity *ratione personae* and immunity *ratione materiae*.

28. Some members of the Commission supported the Special Rapporteur's position that immunity was grounded in the sovereign equality of States and stability in international relations. However, other members drew attention to the fact that immunity also placed a limitation on the sovereignty of the forum State insofar as it prevented the exercise of the latter's jurisdiction.

29. Lastly, some members of the Commission expressed concern at the fact that in establishing the basis and nature of immunity, the Special Rapporteur had not taken sufficient account of new aspects of international law, related to the effort to combat impunity, which reflected a tendency to limit immunities and their scope.

30. There was broad support for the idea that immunity was procedural, not substantive, in nature, as the Special Rapporteur had maintained in his reports. However, some members of the Commission were in favour of addressing the topic of immunity from a substantive perspective as well.

31. Generally speaking, the members of the Commission endorsed the distinction between immunity *ratione personae* and immunity *ratione materiae*, although no explicit opinions on the implications of such a distinction were expressed.

32. Concerning the persons to whom immunity would apply, there was a short debate on the use of the terms "official", "agent" and "representative". However, the debate on the question of which term should be used was inconclusive. In any event, some members of the Commission agreed with the Special Rapporteur that all State officials enjoyed immunity by virtue of their office. Other members, however, drew attention to the need to define the term "official" and to limit it to persons involved in the exercise of governmental authority or in public service.

33. Concerning the persons who enjoyed immunity *ratione personae*, many of the Commission's members expressed support for the inclusion in this category of members of the so-called "troika": Heads of State, Heads of Government and ministers for foreign affairs. However, some members questioned the appropriateness of extending such immunity to include ministers for foreign affairs. Other members were in favour of including in this category other high-level officials (such as ministers of defence and ministers of trade) who are quite often involved in international affairs. Attention was also drawn to the possibility of establishing criteria for determining which high-level officials of States, other than the "troika", might enjoy such immunity, but other members of the Commission were of the view that only the "troika" enjoyed immunity.

34. With respect to the scope of immunity and the identification of any exceptions to it, some members of the Commission considered that immunity was absolute; they shared the Special Rapporteur's view that none of the customary justifications could justify any kind of exception to immunity. Other members, however, thought that it was necessary to take into account certain circumstances under which immunity would not apply, such as accusations arising from non-official acts,

competing *jus cogens* norms in respect of international crimes, or the commission of international crimes that are condemned by the international community as a whole. Still other members of the Commission said that competing *jus cogens* norms and the existence of international crimes were irrelevant for purposes of immunity. In that context, some members recalled that the definition of the scope of immunity must make provision for international crimes for two reasons: the prior work of the Commission in connection with the draft code of crimes against the peace and security of mankind, and the fact that there was no immunity from prosecution by the international criminal courts.

35. The members of the Commission also expressed their views concerning the concept of an "official act" from the point of view of its scope and of its relationship to the international responsibility of States. Some members considered that any act that had been, or appeared to have been, carried out by an "official" must be defined as an official act for which immunity was enjoyed. However, other members supported a restrictive definition of an "official act", excluding conduct that might, for example, constitute an international crime. Some members were in favour of treating the concept of an "official act" differently depending on whether the act was attributed to the State in the context of responsibility or to individuals in the context of criminal responsibility and immunity.

36. There was less discussion of the procedural issues covered in the third report of the Special Rapporteur (A/CN.4/646). Most of the Commission's members endorsed the general approach taken by the Special Rapporteur in this area (invocation of immunity, timing and form of invocation of immunity, waiver of immunity, etc.), although some members expressed reservations, arguing that agreement on the substantive issues raised in the second report of the Special Rapporteur must be reached before the procedural aspects of immunity were addressed.

37. Lastly, with respect to the approach to be taken by the Commission in its work on the topic, its members expressed various opinions during the debate as to whether the topic should be addressed solely in terms of *lex lata*, or whether an analysis of *lex ferenda* should also be included. There were also differences of opinion as to whether the topic should be viewed as an exercise in codification or whether the element of progressive development should be included. Some members of the Commission, arguing for a cautious approach, were in favour of beginning with a study of *lex lata* owing to the highly sensitive nature of the topic. Other members stressed that in any event, the Commission's approach to the topic must be balanced in order to weigh the principle of immunity against the need to combat impunity.

C. The debate in the Sixth Committee of the General Assembly

38. The Sixth Committee dealt substantively with the topic of the immunity of State officials from foreign criminal jurisdiction at the sixty-third (2008)[6] and sixty-sixth (2011)[7] sessions of the General Assembly. Statements by delegations also offer points of interest that clarify States' views concerning the reports of the former Special Rapporteur, and immunity in general.

---

[6] See A/CN.4/606, paras. 89 to 110. See also the following summary records of the Sixth Committee of the General Assembly: A/C.6/63/SR.22 to SR.25.

[7] See A/CN.4/650, paras. 4 to 13. See also the following summary records of the Sixth Committee of the General Assembly: A/C.6/66/SR.18 to SR.20, SR.24 and SR.26 to SR.28.

39. States did not comment specifically on the scope of the topic proposed by the Special Rapporteur, although some delegations said that it would be useful to take into account certain matters related to the principle of universal jurisdiction or to the establishment of international courts. Others suggested that the question of the inviolability of State officials, which was closely linked to immunity, should also be included.

40. One delegation expressly stated that the legal basis of immunity was customary international law.

41. A number of delegations supported a functional rationale for immunity, while another group of delegations considered that its rationale was both functional and representative. Some delegations stated that sovereignty was the basis for immunity and one delegation maintained that the ultimate purpose of immunity was to preserve the dignity of the State. Some delegations also spoke of the need to preserve stability in relations between States and to protect States' ability to perform their functions, noting that those interests must be carefully balanced with the prevention of immunity.

42. There was support for the essentially procedural nature of immunity. Some delegations noted that immunity did not relieve officials of the general responsibility to respect the laws of the foreign State or absolve them from accountability for their acts before foreign courts.

43. There was also support for distinguishing between immunity *ratione personae* and immunity *ratione materiae* in establishing the scope of the immunity of State officials. Generally speaking, there was no opposition to maintaining this distinction.

44. Another point on which there was no consensus in the Sixth Committee was the question of which persons enjoyed immunity. There was general agreement as to the immunity *ratione personae* of the "troika", but one delegation also asked the Commission to consider whether this type of immunity also applied to other individuals owing to the high-level offices that they occupied. In that connection, one delegation stated that immunity *ratione personae* should apply only to persons who held representative posts. Opinions on the question of whether general immunity applied to all State officials varied widely and the Commission was requested to define the term "official".

45. There were diverging views concerning the scope of immunity. While some argued that immunity was absolute in every case and that no exceptions could be found in customary law, others maintained that immunity was a general rule to which there could be exceptions. In that connection, some were in favour of using serious international crimes as a criterion for identifying exceptions to immunity, including immunity *ratione personae*, and the Commission was asked to examine this issue from a *lex ferenda* perspective. Similarly, peremptory norms were mentioned as potential grounds for exception, as were crimes that fall within the jurisdiction of international courts and offences that are criminalized under domestic law pursuant to the Rome Statute. On the other hand, one delegation said that exceptions to immunity could undermine international relations, give rise to politically motivated indictments and even raise due process concerns. In any event, some delegations warned that caution was necessary in addressing the issue of exceptions to immunity.

46. Some delegations also said that the Commission must establish an explicit definition of an "official act" that distinguished clearly between an "act of an official" and an "act falling within official functions".

47. The issue of the relationship between immunity and the responsibility of the State was also raised. One delegation noted that in order to address this link properly, the concept of "control" in the context of immunity *ratione materiae* would have to be clarified.

48. Lastly, with respect to the approach to the topic that the Commission should take, a wide range of views concerning the role to be played by a study *de lege lata* or *de lege ferenda* were expressed in the Committee. Some delegations recommended a step-by-step approach whereby the Commission would first address the topic first *de lege lata* and then *de lege ferenda*. Others said that the Commission should take new approaches since international law was evolving and the resulting changes, particularly in connection with international crimes, must be taken into account. In that regard, the Commission was requested to promote greater consistency in international law and to strike a balance between the need to preserve stability in international relations and the need to avoid impunity for serious crimes of international law.

III. The topic "immunity of State officials from foreign criminal jurisdiction" during the present quinquennium: issues to be considered

49. The topic of the immunity of State officials from foreign criminal jurisdiction remains of great interest to States and to the international community as a whole since practice, while consistent, has been controversial. States have been debating this type of immunity in both political and legal forums for several decades, and academic and scientific institutions and think tanks in various parts of the world — including, in particular, the Institute of International Law[8] — have made important contributions to this debate and continue to do so. The debate has also been enriched by the inclusion of several categories that are essential elements of contemporary international law, such as the definition of the international criminal responsibility of individuals, the establishment of the international criminal courts and, generally speaking, the development of appropriate mechanisms for combating immunity for the most serious international crimes. Lastly, it must not be forgotten that the International Court of Justice has made an important contribution to the debate through various cases that are quite well known and have been studied by the former Special Rapporteur, including the Court's recent judgment of 3 February 2012 in *Jurisdictional Immunities of the State: Germany v. Italy: Greece intervening*.[9] This judgment deserves special consideration because some of its methodological elements are of interest in the context of the immunity of States, whose potential implications for the immunity of State officials from foreign criminal jurisdiction the Commission should consider.

---

[8] See the interesting study of the work of the Institute by Special Rapporteur Kolodkin in his preliminary report (A/CN.4/601, sect. III (B)) and the references to the Institute's most recent resolutions in his reports.

[9] Attention should be drawn to the separate opinions of Judges Koroma, Keith and Bennouna and to the dissenting opinions of Judges Cançado Trindade and Yusuf and of then Judge ad hoc Gaja.

50. Furthermore, as is clear from the overview contained in section II of this preliminary report, the topic of the immunity of State officials from foreign criminal jurisdiction is not without controversy. On the contrary, the views expressed by Special Rapporteur Kolodkin in his three reports have given rise to an extensive and interesting debate in which different and, in many cases, opposing positions on some of the basic concepts and categories proposed in these reports can be identified.

51. Within that framework, the Commission must continue its work on this topic and must do so in a systematic, structured manner in order to ensure that the topic is addressed effectively and efficiently. This requires an additional attempt at clarification, both methodological and conceptual, with two objectives: first, to eliminate as many as possible of the "gray areas" that could cause confusion on a topic in need of rapid, adequate clarification; and, second, to draw up a road map that will make it possible to comply, as reliably as possible, with the General Assembly's request that the Commission give priority to the topic.

52. At the current stage of the work, this attempt at conceptual and methodological clarification must take the form of identification of the principal points of contention that currently exist and of those that will have an impact on the future work of the Special Rapporteur and the Commission.

53. Therefore, the following pages will address, in turn, the following issues: the distinction and the relationship between immunity *ratione materiae* and immunity *ratione personae* and the basis for both categories in order to determine whether each of them should be the subject of a separate legal regime (section A); the distinction and the relationship between the international responsibility of the State and the international responsibility of individuals and their implications for immunity (section B); immunity *ratione personae* (section C); immunity *ratione materiae* (section D); and, lastly, mention of the procedural issues related to immunity (section E).

A. Immunity *ratione personae* and immunity *ratione materiae*

54. In his preliminary report, Special Rapporteur Kolodkin recognized the distinction between immunity *ratione personae* and immunity *ratione materiae*. In so doing, he echoed a classic distinction that is reflected in both practice and doctrine. This distinction between the two types of immunity has also been reflected in the Commission's debates and in those of the Sixth Committee. It is unquestionably a distinction that exists in practice, and its continued existence appears to constitute one of the rare points of contention that have emerged to date.

55. However, there appears to be consensus only on the existence of this distinction; it has been impossible to develop a uniform or essentially uniform position on two questions that are essential in mapping the future work of the Commission in this area: (a) whether the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae* requires, or should require, two separate legal regimes; and (b) whether, despite this conceptual distinction, there are basic elements that imply the existence of a certain unity regarding the immunity of State officials from foreign criminal jurisdiction.

56. Concerning the first of these questions, a distinction between immunity *ratione personae* and immunity *ratione materiae* may be considered the most appropriate methodological approach to the topic since it makes it possible to give separate

treatment to the intrinsic, specific circumstances in which each of these types of immunity functions. It will also help to avoid confusion and gray areas, which, in practice, are nevertheless emerging more frequently than might be wished, including in the areas of jurisprudence and doctrine. Lastly, it will make it possible to give separate treatment to the legal regimes to be applied in each case. The Commission may wish to follow this methodological proposal to make a clear distinction between the two types of immunity and, at the same time, to establish a separate legal regime for each of them. This methodological approach is made all the more necessary by the fact that the previous studies do not facilitate such a clear distinction.

57. With respect to the second question, it must be stressed that the distinction between the two types of immunity of State officials from foreign criminal jurisdiction (*ratione personae* and *ratione materiae*) must be made without prejudice to one point on which there is no disagreement whatever: that the two types of immunity have the same purpose, namely, to preserve principles, values and interests of the international community as a whole; they are not granted to the beneficiary in abstract terms, independently from his or her relationship to the State or performance of representative or other functions thereof; and they are granted with a view to the continued performance of such functions and to stability in international relations. Therefore, regardless of the other specific functions of each of these types of immunity, the immunity of State officials from foreign criminal jurisdiction, taken as a whole, has a clearly functional nature that is linked to preservation of the principles and values of the international community, a functional nature of general scope that cannot be reduced solely to immunity from jurisdiction *ratione materiae* even though the term "functional immunity" tends to be used only for this type of immunity.

58. This functional nature of immunity, understood broadly, is the cornerstone of immunity and, in the Special Rapporteur's view, must therefore be a key element of the Commission's work on the topic. Only by taking this aspect into consideration will it be possible to understand, and to help lay a firm foundation for, a system of immunity of State officials from foreign criminal jurisdiction that can be incorporated seamlessly into contemporary international law, thereby ensuring that such immunity does not conflict unnecessarily with other principles and values of the international community that are also in the process of incorporation into international law. This will make it possible to take a balanced approach to the institution of immunity that is the subject of the present report, thereby facilitating the establishment of one or more legal regimes that will provide security in practice and in international relations.

B. The international responsibility of the State and the international responsibility of individuals: implications for immunity

59. A second issue that has been a subject of debate in previous sessions is the relationship between the international responsibility of the State and the international responsibility of individuals and its potential implications for the immunity of State officials from foreign jurisdiction. The debate arose, essentially, in defining the concept of an "official act" and its attribution to the State. Consequently, this is a debate that has taken place particularly with reference to immunity *ratione materiae*, but which also concerns immunity *ratione personae* to the extent that the latter also covers immunity in respect of official acts.

60. It is essential to clarify this relationship in order to determine the methodological approach to immunity; it will also have major consequences for the legal regime or regimes applicable to the two types of immunity. As a result, the Commission might wish to address this issue in the early stages of its work during the present quinquennium. The norms and principles of international law that are particularly applicable to immunity and to the responsibility of the State, as well as the other norms and principles of contemporary international law that are applicable to the international criminal responsibility of individuals and that constitute a set of norms, principles and values of the international community in the effort to combat impunity, should therefore be taken into account.

C. Immunity *ratione personae*

61. As mentioned above, the concept of immunity *ratione personae* is not a point of contention since it is generally agreed that it refers to the immunity enjoyed by certain persons, who are identified individually owing to their specific State office, with respect both to their private acts and to official acts arising from the office that they hold. This office, as well as the functions inherent in it, would explain the recognition of immunity before the criminal courts of a foreign State. However, while the concept of immunity *ratione personae* is not, in itself, controversial, the definition of its characteristics is a matter for discussion on which it has not, as yet, been possible to reach consensus. This is reflected in the reports of the former Special Rapporteur and, in particular, in the debate in the Commission and in the General Assembly.

62. Thus, all that can be concluded is that there is agreement on three basic points: that immunity *ratione personae* is associated with the holding of extremely high State office (although there is insufficient consensus on which holders of such office are included); it covers all acts performed by the beneficiary (both private and official); and it is temporary in nature since immunity *ratione personae* ends at the moment when the person ceases to hold the office that conferred immunity. However, there are still points of contention, particularly with regard to two key issues: the list of persons who could enjoy immunity *ratione personae*, and the question of whether immunity is absolute or restricted. These two issues should therefore be the focus of the Commission's future work on the topic.

63. Concerning the first issue, State practice, doctrine and jurisprudence appear to point to an emerging consensus on the "troika" (the Head of State, the Head of Government and the Minister for Foreign Affairs), each of which invariably enjoys immunity. Some have argued that other persons and/or offices might also enjoy immunity, but it has not been possible to reach any kind of consensus on those persons and/or offices. The Commission might therefore find it useful to study both practice and the applicable principles of international law in order to answer three separate but complementary questions. Is it possible that immunity from foreign criminal jurisdiction could cover persons other than the members of the "troika"? If so, which persons/offices other than the "troika" should enjoy immunity or, at the least, what criteria could be used to identify them? And, lastly, should the list of those who enjoy immunity be closed or open?

64. With respect to the absolute or restricted nature of immunity *ratione personae*, two opposing positions have been expressed to date. For some, there are no

exceptions to this type of immunity, which is therefore opposable to any act carried out by the persons enjoying immunity. For others, on the contrary, certain acts performed by a Head of State, Head of Government, Minister for Foreign Affairs or, where appropriate, any other person who might potentially enjoy immunity would not be covered if the act was contrary to *jus cogens* norms or could be characterized as an international crime. The Commission may find it useful to address this issue, taking the following elements, among others, into account: the very specific position of those who enjoy immunity in the State system, and in the entire system of international relations; the interests, values and principles of international law that are at stake; the functional nature of all immunity and the particular nature of this type of immunity; and, lastly, whether a potential principle of restrictive interpretation is applicable to the institution of immunity.

D. Immunity *ratione materiae*

65. The concept of immunity *ratione materiae* is also not, in the abstract, a point of contention. In the previous work of the Commission and in practice, jurisprudence and doctrine, this term refers to the immunity enjoyed by certain persons who act as official or agents of the State and whose official acts are performed in that capacity. However, some of the integral aspects of this concept have been the subject of various and opposing interpretations that are an obstacle to potential consensus on the definition of immunity *ratione materiae*. At the same time, the debates in the Commission and in the Sixth Committee have raised other points of contention that must be addressed if a legal regime applicable to this type of immunity is to be established. The aforementioned contention concerns, primarily, the following issues: (a) the definition of the subjective scope of immunity *ratione personae*, which Special Rapporteur Kolodkin linked to the general concept of the "official"; (b) the definition of an "official act" and its relationship to State responsibility; and (c) the absolute or restricted nature of immunity.

66. With regard to the first of these issues, it must be stressed that the terminology employed by Special Rapporteur Kolodkin in referring to the persons who enjoy immunity introduced an element of ambiguity that must be resolved. For example, the term "official" ("*funcionario*" in Spanish and "*fonctionnaire*" in French) does not necessarily refer to a single general category of persons in the service of the State since national legal regimes vary widely. The Commission might therefore reconsider the possibility of using a term that better reflects the subjective reality that is the basis for immunity *ratione materiae*.

67. On the second point, the definition of an "official act" has also been hotly debated with regard both to the concept itself and to its implications for immunity. In particular, the Commission may find it useful to distinguish between official acts and unlawful acts; between official acts and the attribution of an act to the State; and between the responsibility of the State and the criminal responsibility of individuals, both of which may arise from the same official act. In defining the term "official act", practice, the applicable principles of international law and the current values of the international community must be taken into account. Lastly, the question of whether restrictive interpretation criteria apply to this type of immunity must also be considered.

68. Lastly, there is insufficient consensus on the question of whether there are exceptions to this type of immunity, particularly in cases involving the violation of *jus cogens* norms or the commission of international crimes. The same question arises as in the aforementioned case of immunity *ratione personae*; however, it should be noted that there appears to have been greater support for a potential exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*. In any event, the Commission should examine this issue on the basis of the same parameters that have been mentioned above in relation to immunity *ratione personae*, taking also into account the question of whether the differences between these two types of immunity come into play.

E. Procedural aspects of immunity

69. By its very nature, the effective exercise of foreign criminal jurisdiction over State officials occurs in the context of judicial proceedings. The question of its applicability during a prior and, to some extent, essentially preparatory phase of those proceedings may also be raised. Therefore, the procedural aspects of immunity are an essential and unavoidable element of work on the topic. Special Rapporteur Kolodkin devoted his third report (A/CN.4/646) to these issues. While that report was not discussed extensively by the Commission, issues relating to the form of invocation of immunity, the timing of its invocation and the potential waiver of immunity, among others, were considered less controversial than the substantive issues addressed in the present report.

70. The Special Rapporteur therefore considers that this last set of questions should ultimately be the subject of specific study in order to determine whether, among other options, it would be possible to establish a single procedural regime that would include both immunity *ratione personae* and immunity *ratione materiae* or whether the specific characteristics of these two categories will require the establishment of different procedural rules for each of them. This does not mean, however, that certain procedural aspects should be ignored in addressing the substantive issues mentioned above since the essentially procedural nature of immunity makes this necessary.

IV. Workplan

71. The future work of the Commission cannot and should not ignore its previous work. However, owing to the methodological considerations set out above, the Special Rapporteur is of the view that a new workplan for the next quinquennium should be established.

72. This workplan should focus on the points of contention mentioned above and should address them in a systematic, ordered and structured manner. To that end, the Special Rapporteur considers it useful to divide these issues into four groups:

1. General issues of a methodological and conceptual nature
    - 1.1 The distinction between immunity *ratione materiae* and immunity *ratione personae* and the implications of that distinction
    - 1.2 Immunity in the system of values and principles of contemporary international law

1.3 The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other

2. Immunity *ratione personae*

2.1 The persons who enjoy immunity

2.2 The material scope of immunity: private acts and official acts

2.3 The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play

3. Immunity *ratione materiae*

3.1 The persons who enjoy immunity: the remaining terminological controversy and the definition of an "official"

3.2 The definition of an "official act" and its relationship to the responsibility of the State

3.3 The absolute or restricted nature of immunity: exceptions and international crimes

4. Procedural aspects of immunity

73. The Special Rapporteur has already held one set of informal consultations with the members of the Commission, on 30 May 2012. The following list of questions were submitted to the members for consideration during those consultations and should be read jointly with the sets of questions set out above since they refer to and elaborate upon some of them:

Some methodological and general conceptual issues

- What is the legal and sociological basis of the immunity of State officials from foreign criminal jurisdiction?
- Could immunity serve as an instrument for the protection and guarantor of some principles and values of the international community?
- Should those principles and values be balanced with other principles and values of the international community?
- What is the place for the functional approach to immunity?
- Is it useful to approach the topic by retaining the distinction between immunity *ratione personae* and immunity *ratione materiae*?
- What should be the consequences of such an approach? Two different legal regimes?
- Should the link between State responsibility and individual responsibility be present in the approach of the topic? If yes, what should be this link?
- Is the substance/procedure distinction useful in addressing the topic?

Immunity ratione personae

- Persons entitled to immunity: a narrow or a broad approach? Closed list or open list?

- Scope of immunity: an equal or a different treatment of private acts and official acts?
- Could there be a place for international crimes in the approach to immunity *ratione personae*?

Immunity ratione materiae

- A terminological issue: are the words "official", "fonctionnaire" and "funcionario" the most accurate words with regard to the description of persons entitled to immunity?
- The concept of "official act": a narrow or a broad approach? What link with State responsibility?
- Could there be a place for exceptions, in general terms, with regard to immunity *ratione materiae*? If yes, which exceptions?
- Could there be a place for international crimes in the approach to immunity *ratione materiae*?

74. For each of these questions, and for others that will need to be addressed in connection with them, the Special Rapporteur proposes to prepare draft articles which will be submitted progressively to the Commission. It would be premature to make any proposal concerning the final form that the outcome of this work should take, although the normative aspect of the topic cannot be ignored.

75. Concerning the method of work that the Special Rapporteur proposes to follow in addressing the remaining issues, the Commission's attention is drawn to the fact that a step-by-step approach, addressing each of the various groups of remaining questions in turn, is considered the most appropriate. The Special Rapporteur is convinced that this method, which makes it possible to isolate the issues in need of consideration, will make it easier to structure a debate that has the disadvantage of focusing on issues that are numerous and, moreover, sensitive and extremely complex. Such an approach is likely to lead to concrete results more quickly.

76. The Special Rapporteur also considers it essential to continue to make a detailed study of practice in the broad sense of the word. To that end, she will continue to use the memorandum prepared by the Secretariat in 2009 (A/CN.5/596 and Corr.1) while including subsequent practice that was not covered by the former Special Rapporteur in his three reports.

77. Lastly, as to whether to approach the topic from the perspective of *lex lata* or *lex ferenda*, the Special Rapporteur would like to state that in her opinion, the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches. She believes that, on the contrary, both aspects must be taken into account in the future work of the Commission although she fully realizes the usefulness of beginning with *lex lata* considerations and including an analysis *de lege ferenda* of some topics, as needed, at a later date. This approach will make it possible to address the topic in a balanced manner, and it is fully consistent with the Commission's mandate to pursue simultaneously the codification and progressive development of international law.